85-1582

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October TERM, 1985

IDA JANE GROSS,

Petitioner

v.

THOMAS R. GROSS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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EDITOR'S NOTE

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QUESTION PRESENTED

1. Where Ohio's court of last resort in Gross v. Gross (1984), 11 Ohio St. 3d 99, 464 N.E. 2d 500, extended its jurisdiction in this litigation only to determine as an issue of first impression whether an antenuptial agreement containing event-of-divorce provisions could be enforced by a husband who had breached the marriage contract, but failed to determine issues concerning the substantial property rights of the wife under the agreement itself and, on remand, the domestic relations court refused to apply the agreement according to its terms because of the limited scope of the Ohio Supreme Court remand order and, on further appeal both the

court of appeals and the Ohio Supreme Court declined to adjudicate the issue, did such a fundamentally unfair judicial process deprive the Petitioner of her marital property rights without affording her Constitutional due process of law and equal protection of the laws?

PARTIES

Petitioner is Ida Jane Gross. Respondent is Thomas R. Gross. Until their divorce on May 18, 1982 the parties were husband and wife.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.	i
PARTIES.	iii
APPENDICES.	iv
TABLE OF AUTHORITIES.	vii
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO	1
OPINIONS BELOW.	2
JURISDICTION.	3
CONSTITUTIONAL PROVISIONS INVOLVED.	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT.	20

APPENDICES:

1 Judgment Entry of the Supreme Court of Ohio, sua sponte, dismissing Petitioner's appeal from the Court of Appeals of Franklin County A-1

2 Court of Appeals Decision dated September 19, 1985. . . .A-3

3 Journal Entry of Judgment by the Franklin County, Ohio Court of Appeals A-34

4 Decision of Franklin County, Ohio Court of Common Pleas dated December 28, 1985 . . . .A-36

5 Entry of Franklin County, Ohio, Court of Common Pleas . .A-42

6 Ohio Supreme Court Decision dated June 13, 1984, 11 Ohio State 3d 99, 464 N.E.2d 500. .A-48

7A Ohio Supreme Court Entry. . . .A-105

7B Ohio Supreme Court Mandate. . .A-107

8 Court of Appeals Decision dated February 10, 1983 . . . .A-109

9 Court of Appeals Entry dated February 10, 1983 . . . .A-138

10 Trial Court Decision dated May 10, 1982. . . . . .A-140

11 Trial Court Entry dated May 10, 1982. . . . . .A-148

12 Assignment of Errors, Appeal to Franklin County Court of Appeals. A-154

13 Assignments of Errors, Appeal to Franklin County Court of Appeals. A-157

14 Propositions of Law to Ohio Supreme Court A-160

15 Propositions of Law to Ohio Supreme Court. A-163

16 Antenuptial Agreement A-167

17 Rule 12, Ohio Rules of Appellate Procedure A-182

18 Ohio Revised Code, Section 3105.18 . . . . . .A-183

19 Ohio Revised Code, Section 3103.06 . . . . . .A-185

TABLE OF AUTHORITIES

CASES	PAGE
Buettner v. Buettner (Nev. 1973), 505 P. 2d 505.	22
Caldwell v. Caldwell (Wisc. 1958), 92 N.W. 2d 356	21
Cherry v. Cherry (1981), 66 Ohio St. 2d 348, 421 N.E. 2d 1293 . .	23
Craig v. Boren, 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451 . . .	28
Crouch v. Crouch (Tenn. 1964), 398 S.W. 2d 288.	21
Daugherty v. Torrence (1982), 2 Ohio St. 3d 69, 422 N.E. 2d 1295.	14
Fricke v. Fricke (Wisc. 1950), 42 N.W. 2d 500	21
Greene v. McElroy (1959), 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S.Ct. 1400	30
Gross v. Gross (1984), 11 Ohio St. 3d 99, 464 N.E. 2d 500 . . .	i, 3, 15, 22
In re Marriage of Gudenkauf (Iowa 1973), 204 N.W. 3d 586	20
Matthews v. Eldridge (1976), 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893	30

Matlock v. Matlock (Kan. 1978), 576 P. 2d 629. 22

Mulford v. Mulford (Neb. 1982), 320 N.W. 2d 470. 20

Newman v. Newman (Colo. 1982), 653 P. 2d 728. 22

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 36 L.Ed. 2d 16, 3 S.Ct. 1278 28

Scherer v. Scherer (Georgia 1982), 292 S.E. 2d 662. 22

Schmidt v. Lessard (1974), 414 U.S. 473, 38 L.Ed. 2d 661, 94 S.Ct. 713. 30

Shelley v. Kraemer (1948), 334 U.S. 1, 68 L.Ed 836, 92 S.Ct. 1161. 25

State v. Jennings (1982), 69 Ohio St. 3d 389, 433 N.E. 2d 157. 14

Teeter v. Teeter (1985), 18 Ohio St. 3d 292, 480 N.E. 2d 1112 . . 23

Tomlinson v. Tomlinson (Ind. App. 1976), 352 N.W. 2d 785 22

Unander v. Unander (Oregon 1973), 506 P. 2d 719. 22

Wolfe v. Wolfe (1976), 46 Ohio St. 2d 399, 350 N.E. 2d 413. 23

OTHER AUTHORITIES

Annotation (1931), 70 A.L.R. 826. 21

Annotation (1935), 98 A.L.R. 533 21

Clark, Antenuptial Contracts, 50 U. Colo. L. Rev. 150 (1979). . . 21

Comment, 12 Rutgers L.J. 283 (1983). 21

Comment, 74 U. of Mo. Kansas City L. Rev. 31, 1978 21

Klarman, Marital Agreements in Contemplation of Divorce, 10 U. Mich. J. of Legal Reform 397, (1977) 20

Ohio Revised Code, Section 3103.16 24

Ohio Revised Code, Section 3105.18 23

Rule 12, Ohio Rules of Appellate Procedure. 14

Rule 17.1, United States Supreme Court Rules. 4

28 U.S.C. Section 2101(c). 4

CONSTITUTIONAL CITATIONS

Fifth Amendment, United States Constitution 4, 29

Fourteenth Amendment, United States Constitution. 4, 29

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

IDA JANE GROSS,

Petitioner

v.

THOMAS R. GROSS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue for the purpose of reviewing the judgment of the Ohio Supreme Court entered in the above case wherein said Court's jurisdiction was refused with respect to the Petitioner's

appeal of the Decision of the Franklin County, Ohio Court of Appeals, entered on September 19, 1985.

OPINIONS BELOW

Petitioner's motion to certify the record herein was dismissed by the Ohio Supreme Court without public report on December 11, 1985. The September 19, 1985 Decision of the Court of Appeals of Franklin County, Ohio which was left standing by reason of the Ohio Supreme Court's refusal to extend jurisdiction over this matter has not as yet been and may not be publicly reported. In the

initial Decision of the Court of Appeals of Franklin County, Ohio rendered in this action was publicly reported. The Ohio Supreme Court's Decision of June 13, 1984 was reported at 11 Ohio St. 2d 99, 464 N.E. 2d 500. The pertinent Decisions and Entries are included with the Appendix to this Petition.

JURISDICTION

The Ohio Supreme Court's sua sponte refusal to grant jurisdiction over Petitioner's appeal was entered herein on December 11, 1985 and this petition for a Writ of Certiorari was filed within ninety (90) days following entry of that judgment. The jurisdiction of

this Court is invoked under 28 U.S.C. §2101(c) and Rule 17.1(b), (c), United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Fifth Amendment of the United States Constitution: "No person shall be. . .deprived of life, liberty, or property, without due process of law. . . ."

B. Fourteenth Amendement to the United States Constitution. ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

C. Fourteenth Amendment to the United States Constitution: "No State shall. . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In August of 1968 Respondent, Thomas R. Gross, and Petitioner, Ida Jane Gross, were married. Petitioner was 27 and Respondent was 32. Just before the marriage was to take place, Thomas told Jane that he wanted her to sign an antenuptial agreement containing forfeiture provisions governing her rights upon divorce, which she agreed to do. Attached to the agreement was a list of assets and liabilities describing, in the language of the agreement itself, the "property of Thomas" and the "property of Jane." Jane held assets of approximately $5,000.00 value; Thomas of approximately $550,000.00.

With regard to maintenance alimony the antenuptial agreement provided that Petitioner waived her rights as a surviving spouse, and that the maximum maintenance alimony that she could receive was Two Hundred Dollars ($200.00) per month, for not more than ten (10) years.

The Gross family consists of the parties' own son, Petitioner's two children from her previous marriage, and Respondent's two children from his previous marriage. While these five children were fairly young there was no thought of Jane pursuing a business career, and even after the children were old enough for Petitioner to consider a job outside the home, Respondent insisted that she not do so and care for the youngest child.

Petitioner was extremely active in social and community functions and attended many business meetings and activities associated with Respondent's regional Pepsi-Cola distributorship, which his parents had acquired many years before.

During their marriage, Respondent had controlled all financial matters. Respondent would simply give Petitioner an "allowance" to pay for food and other miscellaneous items. The only financial information Petitioner ever received was in the form of periodic financial statements prepared by accountants. In many cases, Petitioner was not informed about gifts of stock or other property. The stock would simply be placed in Respondent's safety deposit box. Petitioner was required on numerous occasions to

endorse without explanation checks made out in her name.

After 12 years of marriage, Respondent Thomas Gross filed an action for divorce. Because he lacked grounds, he was forced to dismiss the action after presenting his case-in-chief. Although Petitioner did have substantial grounds for divorce under Ohio law, she did not wish to terminate the marriage.

After his divorce action was dismissed Respondent stopped making the minimal temporary support payments which had been ordered during the pendancy of the litigation and declined to return to the residence. These temporary support payments, in the amount of $200.00

monthly, were barely enough for Petitioner to survive on. Without them she was truly destitute, despite the substantial wealth then controlled by Respondent, hereinafter described. Petitioner eventually concluded that she had no viable recourse but to file an action herself, and following trial, on May 18, 1982, she was granted a divorce from Thomas on grounds of extreme cruelty.

In considering the enforceability of the antenuptial agreement the trial court held that the document prevented him from ordering an equitable division of the property of the parties and from awarding reasonable alimony and litigation expenses to Jane. The court also held, by implication, that the antenuptial agreement prevented the division

of property acquired by Respondent and Petitioner during their 14-year marriage but placed by Respondent in his name alone, for she was awarded nothing of such marital assets. Petitioner was granted the incredible permanent annual alimony allowance of Two Thousand Four Hundred Dollars ($2,400.00) for a period of ten (10) years or until her re-marriage or death, or until Respondent's decease!

In contrast to Jane's economic plight, the joint financial statement for the parties, prepared in 1980 by accountants Clark, Schaefer, Hackett & Co., and submitted into evidence, listed total assets of more than Eight Million Dollars ($8,000,000.00) and net equity of approximately Six Million Dollars ($6,000,000.00) under Tom's control. In

addition, the joint income tax return of the parties for 1980 listed gross income received by Tom of approximately Two Hundred Sixty Thousand Dollars ($260,000.00). It was later learned through contacts between Jane and the Internal Revenue Service, which were brought to the trial court's attention, that Thomas had forged Petitioner's name on the parties' 1981 federal income tax return, which he had filed a month prior to trial. That return showed that he had in fact earned Three Hundred Sixty Thousand Dollars ($360,000.00) in 1981. It was learned prior to trial that he had also recently transferred certain valuable real property to his divorce attorney "in trust", which the trial

court apparently considered to be non-marital property as well, under the antenuptial agreement.

The trial court's Decision was appealed to the Tenth District Court of Appeals of Ohio. The first assignment of error asserted by Petitioner was that the consideration for entering into an antenuptial agreement is the marriage itself, and that a party who breaches the marriage contract cannot enforce such agreement against the innocent spouse. In other assignments of error, however, Petitioner asserted that, even assuming the enforceability of the agreement, it simply did not apply to the very substantial marital property acquired by the parties during marriage by means of the large annual earnings and other post-marriage resources. The

agreement did not contain an after-acquired property clause and the property description attached thereto did not list or pertain to any such assets.

On February 10, 1983 the court of appeals entirely reversed the trial court's judgment. The appellate court's opinion was grounded upon the central holding that the terms of an antenuptial agreement should not be enforceable by a party who breached the marriage contract, for he was thus also in breach of the antenuptial agreement. Apparently because it took this approach the court of appeals did not consider Jane's other arguments and assigments as to the proper distribution of property under the agreement if it were enforced, although Ohio law requires that all

errors assigned by a party be dealt with by the Court in writing. State v. Jennings (1982), 69 Ohio St. 2d. 389, 433 N.E. 2d 157; Daugherty v. Torrence (1982), 2 Ohio St. 3d 69, 442 N.E. 2d 1295; Rule 12(A), Ohio Rules of Appellate Procedure.

Respondent successfully sought the jurisdiction of the Ohio Supreme Court. The issues accepted for review were stated in this manner by the court's majority:

> The queries submitted for determination here are threefold. The first is whether antenuptial agreements which concern divorce or separation and subsequently provide for the disposition or division of property and for sustenance alimony, are invalid as being repugnant to public policy upon the basis of promoting marital discord.
>
> If such agreements are generally held not to be void per se, the second issue is whether they may be enforced at the time of divorce by

> the party found to be a fault within the marriage. Third, if such agreements are held to be lawful and enforceable even by a party found to be at fault in a divorce, may a trial court modify the division of property between the parties or award sustenance alimony in a different manner than set forth in the antenuptial agreement. (Emphasis added.)
>
> [Gross v. Gross (1984), 11 Ohio St. 3d 99, at 100.]

Petitioner clearly preserved her position that the antenuptial agreement, even if enforceable under the circumstances, did not apply to property acquired during the marriage and not mentioned or otherwise described therein.

In its June 13, 1984 opinion, the Ohio Supreme Court held that antenuptial agreements containing event-of-divorce provisions would not be void per se under Ohio law, and that they might be enforced regardless of fault on the part

of the spouse seeking to assert their terms. In so holding the court wrote at page 406:

> We, therefore, join those other jurisdictions that have expressed the growing trend of legal thought in this country that provisions contained within antenuptial agreements providing for the disposition of property and awarding sustenance alimony upon a subsequent divorce of the parties are not void per se as being against public policy. We hold that such agreements are valid and enforceable if three basic conditions are met: one, if they have been entered into freely without fraud, duress, coercion or overreaching; two, if there was a full disclosure, or full knowledge, and understanding, of the nature, value and extent of the propsective spouse's property; and, three, if the terms do not promote or encourage divorce or profiteering by divorce.
>
> The elements of the first condition may be read with their generally accepted meaning being applicable. Accordingly, the term "overreaching" is used in the sense of one party by artifice or cunning, or by significant disparity to understand the nature of the transaction, to outwit or cheat the other.

> The elements of the second condition would be satisfied either by the exhibiting of the attachment to the antenuptial agreement of a listing of the assets of the parties to the agreement, or alternatively a showing that there had been a full disclosure by other means. (Emphasis added.)

The court went on also to hold that a standard of "conscionability" must be applied in reviewing the terms of antenuptial agreements, but only as it might pertain to maintenance alimony, indicating that enforcement of the maintenance forfeiture provisions contained in the specific agreement at issue would indeed be "unconscionable". The judgment of the court of appeals was reversed and the cause was remanded to the trial court for further proceedings, but only to establish a conscionable level of maintenance alimony. The Ohio Supreme Court simply did not address the issue

of whether the agreement applied to the large amount of after-acquired property described in the evidence at trial and, if it did, how such assets should be distributed.

On remand the domestic relations court refused to consider the issue of what marital property should be awarded Petitioner, indicating that such question was beyond the scope of the remand and had already been determined by implication in the Ohio Supreme Court, through its failure or refusal to speak to the matter.

Petitioner again appealed to the Court of Appeals. That court, under a different panel than had presided upon Jane's first appeal, did not determine whether or not the agreement somehow applied to property acquired during

coverture, based upon its conclusion that, in light of the Ohio Supreme Court's review of the case, the Court of Appeals had no reason to consider the issue. In precatory language, however, the court set forth the view that all property which had been placed in the name of Thomas R. Gross during the marriage should be his, free of Jane's claims upon divorce, regardless of the origin of the resources used to obtain such assets or the specific language of the agreement.

The Ohio Supreme Court subsequently refused to extend jurisdiction over the case again, leaving Jane with no state-level recourse to gain possession of the marital property which was of such value to her and her youngest child -- which issue she had timely and properly

attempted to bring before every Ohio court which considered her cause.

Petitioner now seeks the jurisdiction of the Supreme Court of the United States, praying that a Writ of Certiorori issue to the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

This case is one of first impression in Ohio and elsewhere, as it appears, including the United States Supreme Court. The highest courts of several states have held that antenuptial agreements containing forfeiture provisions related to divorce are contrary to public policy and are, therefore, void. See, e.g., Mulford v. Mulford (Neb. 1982), 320 N.W. 2d 470; In re Marriage

of Gudenkauf (Iowa 1973), 204 N.W. 3d 586; Crouch v. Crouch (Tenn. 1964), 398 S.W. 2d 288; Caldwell v. Caldwell (Wisc. 1958), 92 N.W. 2d 356; Fricke v. Fricke (Wisc. 1950), 42 N.W. 2d 500; see also cases cited in Annotation (1931), 70 A.L.R. 826 and Annotation (1935), 98 A.L.R. 533.

Commentators have noted that there has been a trend toward permitting the enforcement of antenuptial agreements containing event-of-divorce provisions, however. Clark, Antenuptial Contracts, 50 U. Colo. L. Rev. 150 (1979); Klarman, Marital Agreements in Contemplation of Divorce, 10 U. Mich. J. of Legal Reform 397, (1977); Comment, 74 U. of Mo. Kansas City L. Rev. 31, 1978; Comment, 12 Rutgers L.J. 283 (1983). Nevertheless, in those cases a number of

equitable restrictions have been placed upon the parties such that the conscionability of language contained in antenuptial agreements relative to divorce must be taken into account by the courts in rendering judgment. See, e.g., Newman v. Newman (Colo. 1982), 653 P. 2d 728; Scherer v. Scherer (Georgia 1982), 292 S.E. 2d 662; Unander v. Unander (Oregon 1973), 506 P. 2d 719; Buettner v. Buettner (Nev. 1973), 505 P. 2d 505; Matlock v. Matlock (Kan. 1978), 576 P. 2d 629; Tomlinson v. Tomlinson (Ind. App. 1976), 352 N.W. 2d 785.

With its decision in Gross v. Gross (1984), 11 Ohio St. 3d 99, 464 N.E. 2d 500, Ohio joined the minority of states following the aforementioned "trend".

The Ohio General Assembly long ago enacted appropriate statutory provisions

governing the allowance of both maintenance and property alimony upon divorce. See Ohio Revised Code, Section 3105.18. The Ohio Supreme Court has interpreted this statute to mean that the courts of domestic relations shall at least commence the divorce process with a view toward dividing marital property on an equal basis, with the usual discretion permitted in the allocation of certain assets to one party versus the other. Cherry v. Cherry (1981), 66 Ohio St. 2d 348, 421 N.E. 2d 1293; Wolfe v. Wolfe (1976), 46 Ohio St. 2d 399, 350 N.E. 2d 413; Teeter v. Teeter (1985), 18 Ohio St. 3d 292, 480 N.E. 2d 1112.

Where an antenuptial agreement on its face does not alter the lawful reach of the statute pertinent to property

division, the terms of the statute per force apply, for post-nuptial agreements or modifications of antenuptial agreements after marriage are prohibited under Ohio law. Ohio Revised Code, Section 3103.06. The operation of Ohio's property and alimony statute would have compelled that Petitioner in the case at hand receive at least several hundred thousand dollars in marital assets, and perhaps a great deal more.

Petitioner asserts that, despite a large and growing number of women in the work force of the United States, there remains a substantial benefit to society in the commitment of a married woman to accept employment wholly within the home, to care for her husband and her children, if that is the parties' mutual

desire. Consistent with Ohio's aforesaid divorce statute such a housewife cannot Constitutionally be required to forfeit her interest in all valuable property acquired during marriage simply because her husband insisted on titling the marital property only in his name, and because the courts of the State of Ohio fail or refuse to afford the wife procedural due process so as to enforce the terms of an antenuptial agreement executed by the parties governing such issue in lieu of the statute.

The actions of the Ohio courts in the case at hand constitute "state action", Shelley v. Kraemer (1948), 334 U.S. 1, 68 L.Ed. 836, 92 S.Ct. 1161, which has resulted in denial of fundamental fairness in the adjudication process, in violation of Petitioner's

rights to procedural due process of law and to equal protection of the laws.

As this Court will readily observe from a review of the antenuptial agreement at issue, its object was to preserve apart from the marriage estate certain "property of Thomas" and the "property of Jane". The assets to which this language referred were listed specifically in an attachment to the antenuptial agreement itself, and primarily pertained to Thomas' stated desire to preserve his interest in the family-owned Pepsi Co. franchise, as the Ohio Supreme Court observed. No after-acquired property clause appeared therein, nor was any other general language contained in the agreement which might have lead to the belief that it was intended that Jane Gross might

receive from the forced break-up of her 14-year marriage no interest in the parties' marital property, except for a one-half interest in the residence.

The factual circumstances of this case are not complex. It cannot be disputed that the property in existence at the time of the marriage was not the property listed in the attachment to the antenuptial agreement itself. Certain of the property available at the time of divorce did have a common origin in the aforementioned Pepsi Co. distributorship stock originally listed in the attachment to the agreement, although the form of such stock and other related assets had substantially changed and the values had greatly increased -- in part due to the services rendered by the Petitioner herself. Of Jane's primary interest

however, was the fact that a very substantial number of stocks, bonds and other choses in action, as well as real estate of significant value, necessarily had been purchased with the income earned by the Respondent. The parties' estimated monthly expenses had been at most approximately $6,000.00 in 1981, while Thomas' earnings had been $360,000.00 -- with many of his living expenses paid by his corporations.

Petitioner probably cannot allege that the important property issue which she seeks to put before this Court pertains to a "fundamental right" of which she has been deprived, within the meaning of current law. Craig v. Boren, 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451; San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 36

L.Ed. 2d 16, 93 S.Ct. 1278. Petitioner does aver that her interest in the substantial marital property at issue here cannot have been taken away from her consistent with the provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

Nor can it be said with certainty that Jane Gross is part of a "suspect class" previously recognized by this Court. She is a woman who has performed what may be called the traditional role of housewife, however, and her services rendered in that role are at the root of the property question at issue here.

Mrs. Gross avers that <u>any</u> degree of scrutiny which this Court might wish to afford her petition will reveal no rational basis for what has occurred, however. It is submitted that, where

there is no rational basis for the actions of a state court of last resort which serve to deprive a party of Constitutionally protected property rights without affording fundamental fairness to a litigant under due process of law, through circumstances which amount to a denial of equal protection of the laws, this Court has reason to take notice. cf. Matthews v. Eldridge (1976), 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893; Schmidt v. Lessard (1974), 414 U.S. 473, 38 L.Ed. 2d 661, 94 S.Ct. 713; Greene v. McElroy (1959), 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S.Ct. 1400. Where the process under which such rights have been lost are so novel as those of the case at hand, and where there appears to be a genuine need for direct and well-reasoned resolution of a contemporary

issue such as the one presented, a Writ of Certiorari should be granted.

Respectfully submitted,
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APPENDICES

APPENDIX 1

THE SUPREME COURT OF OHIO
COLUMBUS

- - -

1985 TERM
To wit: December 11, 1985

Ida Jane Gross,	:	
Appellant,	:	
v.	:	Case No. 85-1703
Thomas R. Gross,	:	E N T R Y
Appellee.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Franklin County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial consitutional question exists therein.

COSTS: Motion Fee, $20.00, paid by C. William Brownfield.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY, CLERK

_____, DEPUTY

APPENDIX 2

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ida Jane Gross,	:	
Plaintiff-Appellant:		No. 85AP-32
v.	:	(REGULAR CALENDER)
Thomas R. Gross,	:	
Defendant-Appellee.:		

O P I N I O N
Rendered on September 19, 1985

BROWNFIELD LAW OFFICES, and MR. C. WILLIAM BROWNFIELD, for appellant.
MR. GEORGE R. GROSS, for appellee.

APPEAL from the Franklin County Common Pleas Court, Division of Domestic Relations

McCORMAC, J.

The Ohio Supreme Court remanded this case to the trial court for further procedure after determining that the antenuptial agreement was valid and enforceable with the exception of the provision pertaining to sustenance or

maintenance of the wife, which was found to be unconscionable and voidable by her. The trial court was instructed to order alternative provisions for sustenance alimony by utilizing the same factors that govern the allowance of alimony which is set forth in R.C. 3105.18.

Upon remand, the trial court found that the parties were permitted to fully present to the court evidence pertaining to all relevant factors, including those listed in R.C. 3105.18, at the time of the original trial. The court considered that evidence plus evidence of defendant's income for 1981 per stipulation of counsel.

The trial court awarded plaintiff sustenance alimony in the sum of $2,500 per month, not to be diminished or

modified by what she may earn as long as her earnings are moderate. The alimony was ordered retroactive to the date of the original judgment entry with defendant to be entitled to credits against the alimony arrearage for payments made to the wife during the pendency of the appeal.

The trial court allowed evidence concerning attorney fees and held that, even though the antenuptial agreement provided that no attorney fees be allowed, maintenance of the wife can include an item for legal expense. No attorney fees were allowed, however, as the trial court found that the substantial alimony arrearage provided a fund which plaintiff can use to apply to her attorney fees.

Plaintiff has appealed, asserting the following assignments of error:

"1. The trial court erred upon remand in refusing to consider issues pertaining to the ownership and division of property, to an award of attorneys' fees and expenses, and to the general validity of the antenuptial agreement at issue, where such issues had been timely raised as assignments of error by the plaintiff upon her first appeal, had been sustained and the cause remanded by the court of appeals, and had not been thereafter otherwise adjudicated by the Ohio Supreme Court.

"2. The trial court erred, both upon original trial of this action and upon remand, in refusing to

award plaintiff her lawful interests in the marital property of the parties, or the value thereof, pursuant to the terms of the ante-nuptial agreement at issue and the provisions of R.C. 3105.18.

"3. The trial court erred, both in the original trial of this divorce action and upon remand, in refusing to award plaintiff maintenance alimony in the form of attorneys' fees, costs and expenses of litigation.

"4. The trial court abused its discretion upon remand hearing in making a wholly insufficient maintenance alimony award to the plaintiff.

"5. The trial court erred upon remand hearing of this case in refusing to award the plaintiff an

automobile designated by her out of the property of the defendant, having previously determined that such automobile designation was pertinent to the remand proceedings and that the award of an automobile was proper generally.

"6. The trial court erred in refusing to consider as pertinent to the remand proceedings conducted herein the defendant's failure to have created the trust required under paragraph 15 of the antenuptial agreement, which had been assigned as error to the Franklin County Court of Appeals in the initial appeal of this action and sustained by the appellate court."

The original judgment entry of divorce of May 18, 1982 stated that the

antenuptial agreement was made a part of the decree and to be enforced as such. It was also ordered that plaintiff retain as her sole and exclusive property any securities and any other properties placed in her name during the course of the marriage. Plaintiff was also awarded the personal property located in the residence with the exception of defendant's clothing, sports equipment and other personal items remaining therein. Applying the provision in the antenuptial agreement pertaining to property, plaintiff was awarded no interest in the property in defendant's name other than in regard to specific items contained in the antenuptial agreement. Hence, in the Ohio Supreme Court, the court noted that defendant at the time of divorce had

property in the value of $8,000,000, which, according to the antenuptial agreement and its provisions that were valid and enforceable, were to remain hi . Furthermore, the only reasonable reading of the antenuptial agreement is that defendant's property, whether owned at the time of marriage or acquired after the marriage, which was in his name at the time of divorce, was to remain his since the antenuptial agreement refers to defendant's interest in keeping the stock in the family business for his sons of his first marriage and to fluctuation of values as well as a provision that, upon his death, defendant will make no claim against his estate for these properties.

In any event, this issue was before the Supreme Court at the time of the

appeal to the court and the court found no error in the specific application of the antenuptial agreement to the award of property.

Plaintiff's first and second assignments of error are overruled.

Plaintiff contends in her fourth assignment of error that the trial court abused its discretion in making an insufficient maintenance alimony award to her.

In remanding the case to the trial court, the Supreme Court ordered the trial court to determine the amount of sustenance or maintenance alimony to be ordered by utilizing the factors that govern the allowance of alimony which are set forth in R.C. 3105.18.

In complying with that order on remand, the trial court, in its decision, stated as follows:

> "In considering the relevant factors, the plaintiff does have an earning capacity, but the defendant's earning capacity far exceeds it because of his employment with the family held business which is certainly an important factor for consideration of sustenance alimony. Both parties are relatively young and healthy. The marriage is not of long duration, but did exist for approximately thirteen (13) years. The plaintiff is the custodian of the child who was 11 1/2 years old at the time of the trial of this cause (now 14 years old). The Court does not find, however, that it

would be inappropriate for the plaintiff to be employed outside the home. The parties have enjoyed a relatively high standard of living. While all factors have been considered, the above stand out as important in consideration of the sustenance alimony award.

"The plaintiff is awarded the sum of $2500.00 per month, not to be diminished or modified by what plaintiff may earn, so long as her earning is moderate. The alimony ordered herein is retroactive to the date of the Judgment Entry and is in addition to the child support previously referred to. The defendant is entitled to credits against the alimony arrearage for payments made to the

wife pending appeals, Bentz vs. Bentz 171 O.S. 535."

As stated by the Ohio Supreme Court, "[t]he term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. ***"Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217.

The trial court did not abuse its discretion in making the sustenance alimony award that it made. The trial court examined the factors set forth by R.C. 3105.18 and applied those factors in a reasonable manner. At the time of the original trial, plaintiff submitted an exhibit indicating monthly expenses of about $3,250. Part of those expenses related to the support of a son, which was provided for separately. While there

were no vacation expenses included in that exhibit and there was evidence that the parties took expensive vacations during their marriage, the trial court's order allows enough income for plaintiff to enjoy vacations reasonably consistent with her lifestyle during marriage if she supplements the sustenance alimony provided by defendant with her own earnings by the exercise of her reasonable earning potential, which the evidence showed that she has. Those earnings, if moderate, will not result in a reduction of her alimony.

Plaintiff's fourth assignment of error is overruled.

In plaintiff's third assignment of error, she contends that the trial court erred in refusing to award her mainte-

nance alimony in the form of attorney fees, costs and expenses of litigation.

The trial court found that the antenuptial agreement, which specifically provided that attorney fees were not to be awarded in the event of divorce, was enforceable with the exception of attorney fees incurred in regard to obtaining an award for maintenance of the wife which can include an item for legal expense. In considering an award for expenses for that item, the court noted that the alimony awarded was retroactive to the date of the trial which created a substantial arrearage for the defendant and a sum from which she could pay the balance of her own attorney fees and expenses. Hence, he declined to make an award separate from the retroactive alimony award.

The trial court did not abuse its discretion in so ordering. There was testimony of very substantial attorney fees amounting to $60,000 or more. However, plaintiff did not prevail in many of her legal arguments. She sought to void the antenuptial agreement in its entirety and to obtain a division of property totally separate from the antenuptial agreement. The antenuptial agreement was held valid and enforceable in this respect, as well as in all other respects, with the exception of the maintenance alimony to be awarded plaintiff. Hence, plaintiff prevailed in only a small percentage of her litigation. Most of the litigation was subject to the clause in the antenuptial agreement which was valid and enforceable and which prohibited her from obtaining

attorney fees. Both sides incurred substantial legal expenses in regard to these matters. Defendant undoubtedly incurred substantial legal expenses in defending the portions of the antenuptial agreement which were held to be valid and enforceable. There was a substantial legal basis for defendant to insist that the alimony provision of $200 per month was also enforceable under pre-existing law. While it may have been within the trial court's discretion to allow legal fees to plaintiff in regard to the part of the litigation that related to setting aside the maintenance alimony provision in the antenuptial agreement, it was also within the discretion of the trial court to decide that, under these circumstances, it would be fair and equitable

for each side to be responsible for their own legal expenses. Comparative ability to pay legal expenses is not the sole factor in exercising discretion about the award of attorney fees.

Plaintiff's third assignment of error is overruled.

Plaintiff fifthly contends that the trial court erred in refusing to award her an automobile designated by her out of the property of defendant.

Upon remand, plaintiff sought enforcement of the original judgment (and the provision of the antenuptial agreement which was held to be valid and enforceable) that plaintiff shall be granted an automobile out of the property of defendant.

Plaintiff contends that she is entitled to a Mercedes automobile pur-

chased by defendant after the original divorce decree was granted, as her choice of an automobile. Neither the original judgment decree nor the antenuptial agreement specified how the choice of automobile was to be made. The antenuptial agreement states, as follows, "Jane shall be entitled to the ownership of one automobile out of Thomas' property." The original judgment decree states, "It is further ORDERED, ADJUDGED and DECREED that the plaintiff shall be granted an automobile out of the property of the defendant."

The judgment decree has never been enforced since, during the appellate litigation, the primary issue was whether the property provision contained in the antenuptial agreement was enforceable at all. When the case came

back to the trial court on remand, there was obviously an enforcement problem with this part of the original judgment decree. The automobiles owned by defendant in May 1982 were in likelihood either not in existence or were worth substantially less than at the time of the original judgment decree of May 18, 1982.

If the parties are unable to agree as to which automobile plaintiff was to be awarded out of the property of defendant on May 18, 1982, it is the obligation of the trial court to enforce this provision. At this time, the provision can only be equitably enforced by ascertaining the reasonable market value of each automobile owned by defendant on May 18, 1982. The court then is required to award plaintiff the reasonable market

value of one of these automobiles in lieu of awarding the automobile itself to plaintiff. The selection of the automobile and its reasonable market value of May 18, 1982 is a matter within the discretion of the trial court.

Plaintiff's fifth assignment of error is sustained to the extent that the trial court is ordered to determine and to award plaintiff the reasonable market value of May 18, 1982 of one of the automobiles owned by defendant at that time and to require defendant to pay plaintiff that amount with interest from May 18, 1982.

Finally, plaintiff contends that the trial court erred in refusing to consider whether defendant has failed to

create the trust required under paragraph 15 of the antenuptial agreement, as required by that agreement.

The antenuptial agreement, which is valid and enforceable in this respect, required defendant to create by will or inter vivos trust, a trust with Walter L. Gross as trustee and Jane as beneficiary in a standard form to be approved by the trustee, which shall provide for a principal in the trust of $200,000, or twenty percent of Thomas' net estate after taxes, whichever amout is lesser.

The trial court did not consider whether defendant had complied with that provision. That provision is valid and enforceable against the estate of Thomas should he predecease Jane. Defendant states that he has provided for that trust by will and has submitted some

evidence that he has done so. At this time, it appears that there is no clear issue before the trial court as to this matter. As stated previously, the provision is enforceable against the estate of Thomas. However, upon remand the trial court should ascertain whether defendant has complied with this provision of the antenuptial agreement and should require satisfactory proof for ascertaining that compliance.

Plaintiff's argument that a failure to comply with this provision constitutes a material breach of the antenuptial agreement makes the antenuptial agreement [un]enforceable in its entirety is without merit.

Plaintiff's sixth assignment of error is sustained to the extent indicated in this opinion.

Plaintiff's first, second, third and fourth assignments of error are overruled. Plaintiff's fifth and sixth assignments of error are sustained to the extent indicated in the opinion. The judgment of the trial court is affirmed in part and reversed in part. The case is remanded to the trial court for further procedure consistent with this opinion.

Judgment affirmed in part; judgment reversed in part; and case remanded.

MOYER, J., concurs.

WHITESIDE, J. concurs in part; dissents i n part.

WHITESIDE, J., concurring in part and dissenting in part.

Although I concur in the overruling of the second assignment of error, and the sustaining of the fifth and sixth assignments of error, I must respect-

fully dissent from the overruling of the third and fourth assignments of error and of the first assignment of error, except insofar as it presents the same issue raised by the second assignment of error.

In light of the decision of the Supreme Court in the first appeal [Gross v. Gross (1984), 11 Ohio St. 3d 99], the second assignment of error is not well-taken. However, the third and fourth assignments of error are well-taken. The first assignment of error essentially encompasses the same issues as raised by the other assignments of error and is well-taken except with respect to the issue of division of property.

At the trial prior to the first appeal, defendant admitted that his 1979 income was $252,409, and his income for

1980 was $257,001, but stated that he did not know the amount of his 1981 income, but that his salary alone was $150,000. After remand following reversal upon the first appeal, defendant's 1981 income tax return was stipulated as evidence, which indicates defendant's income for that year to be $359,887, including his salary of $216,539. Under the total circumstances, a sustenance alimony award of only $2,500 per month is unreasonable and unconscionable. See Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217. The sustenance alimony award is only approximately eight percent of defendant's total income and less than fourteen percent of his salary. Since the amount of the sustenance alimony will not be taxable to defendant, there

is only a minimal effect upon his after-tax income, in light of this apparent high tax bracket as indicated by his 1981 tax return.

Without belaboring the point by extensive discussion of the evidence, in my view, the absolute minimum sustenance alimony award that would be reasonable and conscionable under the evidence adduced would be approximately $50,000 per year and at least $4,000 per month. Although the evidence easily would have justified a sustenance alimony award of $100,000 per year or more, there is a range of reasonableness, and a trial court does not abuse its discretion unless the amount awarded is less than the minimum or greater than the maximum that would fall within this extended

range of reasonableness as demonstrated by the evidence.

Although at the original trial plaintiff did present evidence of her minimum needs as being $3,250 per month, such evidence did not take into account some expense factors commensurate with the standard of living established during the marriage and did not take into consideration the income taxes plaintiff will be required to pay upon any sustenance alimony award. Following remand, plaintiff presented an affidavit of her contention as to the amount of income needed to maintain the standard of living established during the marriage, indicating monthly expenses of $6,528 (without provision for income taxes), which affidavit the trial court refused to consider.

A sustenance alimony award of $4,000 per month, the minimum I find to be reasonable, would represent less than fourteen percent of defendant's total income and only twenty-two percent of the salary portion of his income, with a greatly lesser effect upon his after-tax income. On the other hand, such an award would (if she obtains the limited employment for which she is qualified), enable plaintiff to minimize the reduction in her standard of living from the opulent standard of living established during the marriage, one of the controlling factors set forth in R.C. 3105.18. In addition, the court should not ignore the fact that plaintiff has very limited earning ability, no prospective retirement benefits, and no expectancies or inheritances, as well as

the fact that she has very limited assets, while defendant's assets approximate $8,000,000, all factors required to be considered by R.C. 3105.18.

As to attorney fees, the trial court correctly noted that an award of attorney fee expenses constitutes an award for maintenance and, thus, is within the purview of the Supreme Court mandate on remand, even though not specifically mentioned. However, the trial court refused to award attorney fees, indicating it had "considered the expense the wife had incurred in making its award of alimony." There is no explanation, however, of how plaintiff can afford to pay the more than $60,000 accumulated legal expenses from the relatively meager award of $2,500 per month, the amount of the legal fees

representing more than two years of total pretax amount of sustenance alimony awarded. Had the trial court awarded sustenance alimony of $100,000 per year, then, perhaps, it would have been reasonable to make no award for legal expense. However, under the circumstances involved, and the less than reasonable sustenance alimony award, it is unreasonable and unconscionable for the trial court to make no award for legal expenses. Nor is such action justified by reference to so-called retroactive effect of the alimony award to the date of the divorce decree. In the interim, plaintiff has had to find means of support, and there is evidence that she was required to sell some of her comparably small amount of assets in order to support herself.

Although the amounts involved in this case are large, an award of sustenance alimony and legal expenses must be considered in light of the assets and earning abilities of the parties, and their opulent standard of living, not by that which would be reasonable in the average case or one involving persons moderately affluent.

Accordingly, I would sustain the third and fourth assignments of error and remand the cause to the trial court for redetermination.

APPENDIX 3

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ida Jane Gross, Plaintiff-Appellant	:	No. 85AP-32
v.	:	(REGULAR CALENDER)
Thomas R. Gross, Defendant-Appellee.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on September 19, 1985, the fifth and sixth assignments of error are sustained to the extent indicated, and the first, second, third and fourth assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed in part and reversed in part, and this cause is remanded to that court for further

proceedings in accordance with law consistent with said opinion.

McCORMAC and MOYER, JJ.
WHITESIDE, J., concurring in part.

By_____
Judge John W. McCormac

cc: C. William Brownfield
George R. Gross

APPENDIX 4

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

IDA JANE GROSS,) Thursday December 27, 1984
Plaintiff,)
vs.) No. 81-DR-06-1712
THOMAS R. GROSS,)
Defendant.)

DECISION

This matter is before the Court on a remand from the Supreme Court of Ohio wherein the trial Court was directed to consider a sustenance alimony order for the plaintiff in that the alimony provided in the pre-nuptial agreement was unconscionable.

During the trial of the case the parties were permitted to fully present to the Court evidence pertaining to all relevant factors including those listed in 3105.18 of the Revised Code. The Court is considering this and deciding

this remand based upon the evidence presented in that trial plus the income tax return for the year 1981 as per stipulation of counsel.

The Court finds that there is in fact a need for sustenance alimony in excess of that provided in the pre-nuptial agreement and that the amount so provided is in fact unconscionable.

The Court has previously entered an order for the support of the minor child in the amount of $500.00 per month plus the defendant was to provide a hospitalization service plan for the child at defendant's expense. In addition defendant testified that he provided for the child's schooling expenses at a private school.

In considering the relevant factors, the plaintiff does have an earning

capacity, but the defendant's earning capacity far exceeds it because of his employment with the family held business which is certainly an important factor for consideration of sustenance alimony. Both parties are relatively young and healthy. The marriage is not of long duration, but did exist for approximately thirteen (13) years. The plaintiff is the custodian of the child who was 11 1/2 years old at the time of the trial of this cause (now 14 years old). The court does not find, however, that it would be inappropriate for the plaintiff to be employed outside the home. The parties have enjoyed a relatively high standard of living. While all factors have been considered, the above stand out as important in consideration of the sustenance alimony award.

The plaintiff is awarded the sum of $2500.00 per month, not to be diminished or modified by what plaintiff may earn, so long as her earning is moderate. The alimony ordered herein is retroactive to the date of the Judgment Entry and is in addition to the child support previously referred to. The defendant is entitled to credits against the alimony arrearage for payments made to the wife pending appeals. Bentz vs. Bentz 171 O.S. 535.

The plaintiff also seeks "attorney fees". The pre-nuptial agreement specifically provides that the plaintiff would be entitled to no attorney fees in the event of divorce. The remand from the Supreme Court makes no reference to the Court making an order for attorney fees. The requests for attorney fees or expense money has either been overruled

"based on the agreement" or passed at all phases of trial and appeal. In the Supreme Court of Ohio the issue of attorney fees was raised and again raised on the motion to reconsider filed by Mrs. Gross. The Supreme Court overruled this in both decisions. The remand does not call for the Trial Court to make an award of attorney fees or expense money.

The plaintiff is claiming to have legal expenses of over $50,000.00. The Court is not setting the fee of counsel herein the matter of the fees is between counsel and client.

Even though the contract calls for no fees to be paid and the mandate does not call for the Court to set fees, maintenance of the wife can include an item for legal expense. The court has

nsidered the expenses the wife has incurred in making its award of alimony. The Court notes that the alimony is retroactive to the date of the trial of this case which creates a substantial arrearage for the defendant and fund from which plaintiff can apply toward the balance of her attorney fees and other expenses.

Clayton W. Rose, JUDGE

cc; C. William Brownfield
Attorney for Plaintiff
George W. Gross
Attorney for Defendant

APPENDIX 5

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

IDA JANE GROSS,) Thursday December 28, 1984
Plaintiff,)
vs.) No. 81-DR-06-1712
THOMAS R. GROSS,)
Defendant.)

ENTRY

This matter is before the Court on a remand from the Supreme Court of Ohio wherein the trial Court was directed to consider a sustenance alimony order for the plaintiff in that the alimony provided in the pre-nuptial agreement was unconscionable.

During the trial of the case the parties were permitted to fully present to the Court evidence pertaining to all relevant factors including those listed in 3105.18 of the Revised Code. The Court is considering this and deciding

this remand based upon the evidence presented in that trial plus the income tax return for the year 1981 as per stipulation of counsel.

The Court finds that there is in fact a need for sustenance alimony in excess of that provided in the pre-nuptial agreement and that the amount so provided is in fact unconscionable.

The Court has previously entered an order for the support of the minor child in the amount of $500.00 per month plus the defendant was to provide a hospitalization service plan for the child at defendant's expense. In addition defendant testified that he provided for the child's schooling expenses at a private school.

In considering the relevant factors, the plaintiff does have an earning

capacity, but the defendant's earning capacity far exceeds it because of his employment with the family held business which is certainly an important factor for consideration of sustenance alimony. Both parties are relatively young and healthy. The marriage is not of long duration, but did exist for approximately thirteen (13) years. The plaintiff is the custodian of the child who was 1 1/2 years old at the time of the trial of this cause (now 14 years old). The court does not find, however, that it would be inappropriate for the plaintiff to be employed outside the home. The parties have enjoyed a relatively high standard of living. While all factors have been considered, the above stand out as important in consideration of the sustenance alimony award.

The plaintiff is awarded the sum of $2500.00 per month, not to be diminished or modified by what plaintiff may earn, so long as her earning is moderate. The alimony ordered herein is retroactive to the date of the Judgment Entry and is in addition to the child support previously referred to. The defendant is entitled to credits against the alimony arrearage for payments made to the wife pending appeals. Bentz vs. Bentz 171 O.S. 535.

The plaintiff also seeks "attorney fees". The pre-nuptial agreement specifically provides that the plaintiff would be entitled to no attorney fees in the event of divorce. The remand from the Supreme Court makes no reference to the Court making an order for attorney fees. The requests for attorney fees or expense money has either been overruled

"based on the agreement" or passed at all phases of trial and appeal. In the Supreme Court of Ohio the issue of attorney fees was raised and again raised on the motion to reconsider filed by Mrs. Gross. The Supreme Court overruled this in both decisions. The remand does not call for the Trial Court to make an award of attorney fees or expense money.

The plaintiff is claiming to have legal expenses of over $50,000.00. The Court is not setting the fee of counsel herein the matter of the fees is between counsel and client.

Even though the contract calls for no fees to be paid and the mandate does not call for the Court to set fees, maintenance of the wife can include an item for legal expense. The court has

considered the expenses the wife has incurred in making its award of alimony. The Court notes that the alimony is retroactive to the date of the trial of this case which creates a substantial arrearage for the defendant and fund from which plaintiff can apply toward the balance of her attorney fees and other expenses.

_____
Clayton W. Rose, JUDGE

_____
C. William Brownfield
Attorney for Plaintiff

_____
George W. Gross
Attorney for Defendant

APPENDIX 6

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1984 TERM
City of Columbus) To wit: June 13, 1984

Ida Jane Gross, Appellee	)	No. 83-564
vs.	)	APPEAL FROM THE
Thomas R. Gross Appellant.	)	COURT OF APPEALS for Franklin County

APPEAL from the Court of Appeals for Franklin County.

This is an appeal from the court of appeals which reversed the Court of Common Pleas of Franklin County, Division of Domestic Relations, and found that the trial court erred in holding that the antenuptial agreement between the parties was valid and binding.

This case represents significantly important questions previously unanswered by this court, although decided by the highest courts of other jurisdictions. The queries submitted for our

determination here are threefold. The risk is whether antenuptial agreements which concern divorce or separation and subsequently provide for the disposition or division of property and for sustenance alimony, are invalid as being repugnant to public policy upon the basis of promoting marital discord.

If such agreements are generally held not to be void per se, the second issue is whether they may be enforced at the time of divorce by the party found to be at fault within the marriage. Third, if such agreements are held to be lawful and enforceable even by a party found to be at fault in a divorce, may a trial court modify the division of property between the parties or award

sustenance alimony in a different manner than set forth in the antenuptial agreement.

The facts of this case giving rise to the aforestated issues are as follows. In September 1968, Thomas R. Gross, appellant herein, was thirty-two years of age and had previously been married. Appellant had two sons by his prior marriage. Gross was at such time, and still is, part owner of a number of Pepsi-Cola bottling company franchises. Ida Jane Gross, appellee herein, was twenty-seven years of age in September 1968, and had two children by a previous marriage. Mrs. Gross was divorced from her former husband in 1964 and went to work shortly thereafter at the Columbus Pepsi-Cola bottling company as secretary for the marketing manager.

It appears that in time the parties herein became socially involved in addition to their business relationship. Romance blossomed and the parties discussed marriage. One element of these discussions involved a subject often approached by those who have previously been married and are again considering matrimony, i.e., their respective rights to any division of property and support allowances upon a future divorce beween the parties. From the record, it is apparent that some of the considerations involved in the discussion and drafting of the agreement herein were that the appellant was a principal in a successful family business, that he had two sons from a former marrage, and that he wanted his sons to follow in control of the family business. Accordingly, the

appellant had his attorney draw an agreement and submit it to appellee and her legal counsel. It appears that a number of changes were made in the initial provisions of the instrument occasioned by the advice of appellee's counsel (not the same as counsel herein). It seems, however, that appellee's counsel advised her not to sign the final draft, but that appellee opted to sign the agreement. The contract was executed by the parties on September 4, 1968.

The agreement, which was in consideration of the marriage between the parties and their mutual promises, provided, in part, at Section 13, that:

"Jane shall after the consummation of the marriage between the parties hereto, in the event of the separation

divorce of the parties be entitled to receive as alimony or separate maintenance the maximum sum of $200.00 per month for a period of 10 years, from the time of such separation either by legal action (or by actually living apart) or from the date of a divorce action being filed, if a court of competent jurisdiction will award Jane any alimony. This shall be the maximum amount Jane shall be entitled to receive under any and all circumstances and conditions, and Jane shall not be entitled to any division of the property of Thomas nor to any expense money or counsel fees in connection with any separation or divorce, and Jane agrees to waive any and all such rights or claims. Further, Jane specifically releases all her rights of dower in the property of Thomas."

Additional provisions relating to a possible divorce between the parties were the following:

"16. In the event of a divorce the personal residence of the parties shall be sold and the equity therein realized, shall be divided equally between the parties.

"17. In the event of a divorce the personal property and possessions of the parties located in their residence shall be the property of Jane with the exception of Thomas' clothing, sports equipment and other purely personal items. Jane shall be entitled to the ownership of one automobile out of Thomas' property."

The antenuptial agreement also contained provisions relative to payments that would be disbursed from

Thomas' estate to Ida Jane. Such provisions provided for the establishment of a trust in the principal sum of $200,000, or twenty percent of his net estate, whichever was lesser. The income derived from the trust was to be paid to Mrs. Gross for life and upon her death to provide education for her children by her previous marriage.

Attached, and made a part of the antenuptial agreement, was a statement of the assets owned by each party. At the date of the agreement, most of appellant's assets were his interest in the family Pepsi-Cola bottling franchises located in a number of cities. There were additional stocks in other companies, as well as an interest in a real estate partnership. The value of Mr. Gross' assets at the time was listed

in the proximity of $550,000. The appellee disclosed assets of household goods and effects, an automobile, and $1,000 in cash for what is alleged to be a total of approximately $5,000.

The parties were married in September 1968. A son was born of the marriage in 1970. The marriage lasted nearly fourteen years when the appellant filed for divorce. However, this action was dismissed by the appellant. Subsequently, the appellee filed for a divorce which was granted on grounds of extreme cruelty being found attributable to appellant. At trial there was evidence adduced that Mr. Gross had increased his total assets to some $8,000,000 with a net equity of $6,000,000. His gross income for the year 1980 was approximately $250,000. The trial court found

the antenuptial agreement to be valid and enforceable in that it had been fairly entered into since there was no evidence of fraud, duress, or misrepresentation, and there had been a full disclosure of assets. The court entered an order in accordance with the terms of the agreement.

The court of appeals, by way of a majority opinion, opted for the position that antenuptial agreements were not void per se, but that such contracts were not enforceable by a party found to be at fault in a divorce proceeding. The court ruled that such fault was a breach of the terms of the antenuptial agreement. Thus, the court of appeals held that inasmuch as the divorce had been granted upon the trial court's finding that Mr. Gross had been guilty of gross

neglect of duty, he had thereby breached the antenuptial agreement and could not enforce its provisions against Mrs. Gross. Mr. Gross subsequently appealed the decision.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Brownfield, Bowen & Bally, Mr. C. William Brownfield and Mr. William H. Arnold, for appellee.

Murphey, Young & Smith Co., L.P.A., Mr. Alan L. Briggs, Mr. Geoffrey V. Case and Mr. George W. Gross, for appellant.

HOLMES, J. An antenuptial agreement is a contract entered into between a man and woman in contemplation, and in consideration, of their future marriage whereby the property rights and economic interests of either the prospective wife or husband, or both, are determined and set forth in such instrument. These agreements may include: provisions

concerning the disposition or devolution of property and payments for sustenance upon the death of one of the spouses; provisions for the distribution of property and the sustenance or maintenance of one or other of the spouses, most usually the wife, upon a separation or divorce; or a combination of all of these concerns between the parties.[1]

Historically, there has been a notable contrast between the views taken by courts in this country of provisions within antenuptial agreements setting forth the division of property and other rights and interests upon the death of one of the parties, contrasted to provisions in such agreements providing for, or affecting, property rights or con-

jugal and marital rights in the event of divorce.[2] In the majority of jurisdictions, prospective spouses could contract as to the division of their property in the event of the death of one of the parties, and these agreements were generally enforced if the parties made a full disclosure of their assets and there was no showing of fraud, duress, or undue influence in the procurement of the agreement. Such provisions in an antenuptial agreement were generally recognized as being conducive to marital tanquility, and thus in harmony with public policy. In re Estate of Lopata (Colo. 1982), 641 P. 2d 952; Remington v. Remington (1920), 69 Colo. 206, 193 P. 550; Del Vecchio v. Del Vecchio (Fla. 1962), 143 So. 2d 17; Seuss v. Schukat (1934), 358 Ill. 27,

192 N.E. 668; In re Estate of Muxlow (1962), 367 Mich. 133, 116 N.W. 2d 43.

In upholding such agreements concerning the disposition of property upon the death of one spouse, the courts have generally alluded to factors such as the spouses' interest in the preservation of their respective estates,[3] and their reasonable desire to avoid disputes regarding such property after one spouse has died.

While the specific question of the validity of provisions in antenuptial agreements pertaining to the division of property, and proposed settlement of conjugal property rights upon a divorce is one of first impression before this court, the public policy of premarital agreements regarding the disposition of property upon the death of a spouse has

been addressed by this court a significant number of years ago. The first reported case of this Court which recognized the validity of an antenuptial agreement concerning the disposition of property upon the death of one of the parties was that of Stilley v. Folger (1846), 14 Ohio 610. More recent cases have upheld antenuptial agreements regarding disposition of property at the death of the husband even though the provisions made for his surviving spouse were wholly disproportionate. Hook v. Hook (1982), 69 Ohio St. 2d 234 [23 O.O.3d 239]; Troha v. Sneller (1959), 169 Ohio St. 397 [8 O.O.2d 435]; Juhasz v. Juhasz (1938), 134 Ohio St. 257 [12 O.O. 57].

As noted previously, courts throughout the country have historically taken

a significantly different attitude toward provisions in antenuptial agreements providing for a division of property and sustenance alimony upon the divorce of the parties. The prevailing law in the United States was that such contracts were considered as being made in contemplation of divorce and were held to be void as against public policy. In re Marriage of Gudenkauf (Iowa 1973), 204 N.W. 2d 586; Crouch v. Crouch (1964), 53 Tenn. App. 594, 385 S.W. 2d 288; Caldwell v. Caldwell (1958), 5 Wis. 2d 146, 92 N.W. 2d 356; Fricke v. Fricke (1950), 257 Wis. 124, 42 N.W. 2d 500; see, also, cases cited in Annotation (1931), 70 A.L.R. 826, and Annotation (1935), 98 A.L.R. 533.

Generally, two basic policy arguments were advanced for the invalidation

of provisions in antenuptial agreements in reference to the divorce of the parties. First, provisions in such contracts which provide for one spouse to forfeit marital property or conjugal rights are potentially profitable to the other party, would encourage divorce and, therefore, would be contrary to the state's interest in preserving the marriage. Second, the state is virtually a party to every marital contract in that it possesses a continuing concern in the financial security of divorced or separated persons.[4]

In the last decade and a half many changes have taken place in the attitudes and mores surrounding marriage and marital relationships. These changes have altered the public policy view toward antenuptial agreements made in

contemplation of a possible divorce. Some of the factors involved within this evolution of policy are the social changes which affect family law in general, such as the greater frequency of divorce and remarriage, the percentage drop in marriage generally among our citizens, the adoption by a number of states of all or a number of the provisions of the Uniform Marriage and Divorce Act and, most significantly, the widespread adoption of some manner of "no fault" divorce laws.[5] In this latter respect, Ohio adopted the Divorce Reform Act of 1974 which provides a form of "no fault" divorce where the parties may seek a dissolution of their marriage by reducing to writing in a separation agreement their understanding as to matters of custody, child support,

visitation rights, alimony, and property division. R.C. 3105.63.

Exemplary of this trend among the states to reconsider the common-law position or rule of law, which disfavors agreements providing for division of property and sustenance provisions upn divorce, is the often cited case of Posner v. Posner (Fla. 1970), 233 So. 2d 381. The Florida Supreme Court held that antenuptial agreements settling alimony and property rights upon divorce should not be held void ab initio as contrary to public policy. The court adopted the same tests which had previously been applied for the determination of the validity of antenuptial agreements containing provisions disposing of property at time of death, i.e., a showing of good faith in the entry into

the agreement, and a full disclosure of assets. The court also held that upon evidence of changed circumstances, the contract would be subject to the same modification provisions that apply to all support orders in divorce proceedings.

A number of courts in other states followed the lead of Posner and held that this type of antenuptial agreement was valid if fairly negotiated upon a full disclosure of assets. Newman v. Newman (Colo. 1982), 653 P. 2d 728; Volid v. Volid (1972), 6 Ill. App. 3d 386, 286 N.E. 2d 586; Unander v. Unander (1973), 265 Ore. 102, 506 P. 2d 719. In Newman, the Supreme Court of Colorado held that antenuptial agreements dealing with the division of property upon divorce should be analyzed the same as

agreements providing for property division at death so long as the same good faith and full disclosure tests are met. The court further held that the division of property as set forth in such agreements should not be invalidated or altered by a trial judge at any later time unless the spouse seeking to invalidate the agreement can demonstrate nondisclosure, fraud or overreaching at the time of making the agreement.

In Newman, the court adopted the general view that provisions pertaining to maintenance alimony of the wife upon divorce would be lawful if they met the same tests of good faith, full disclosure and absence of overreaching. However, the court held that even though valid at the inception of the agreement, changed circumstances of the parties may

give rise for a trial court to amend this type of provision in the contract.

Upon a review of all of the public policy factors presented, we conclude that the modern trends of marriage and divorce across the country dictate that reaonsable laws must be forthcoming to accommodate these changing social attitudes. It may be reasonably concluded that these types of agreements tend to promote or facilitate marriage, rather than encourage divorce.

We, therefore, join those other jurisdictions that have expressed the growing trend of legal thought in this country that provisions contained within antenuptial agreements providing for the disposition of property and awarding sustenance alimony upon a subsequent divorce of the parties are not void per

se as being against public policy. We hold that such agreements are valid and enforceable if three basic conditions are met: one, if they have been entered into freely without fraud, duress, coercion or overreaching; two, if there was a full disclosure, or full knowledge, and understanding, of the nature, value and extent of the propsective spouse's property; and, three, if the terms do not promote or encourage divorce or profiteering by divorce.

The elements of the first condition may be read with their generally accepted meaning being applicable. Accordingly, the term "overreaching" is used in the sense of one party by artifice or cunning, or by significant disparity to understand the nature of the transaction, to outwit or cheat the other.

The elements of the second condition would be satisfied either by the exhibiting of the attachment to the antenuptial agreement of a listing of the assets of the parties to the agreement, or alternatively a showing that there had been a full disclosure by other means.

A hypothetical example of the type of situation which condition three seeks to avoid is where the parties enter into an antenuptial agreement which provides a significant sum either by way of property settlement or alimony at the time of a divorce, and after the lapse of an undue short period of time one of the parties abandons the marriage or otherwise disregards the marriage vows.

We are called upon to answer other important questions in this case. One is

whether fault on the part of one of the parties, which occasions a divorce, invalidates the agreement, or at least vitiates the terms of the contract as to the one at fault. As to this query, the court of appeals here held that the law of Ohio had been previously pronounced by this court in Southern Ohio Savings Bank & Trust Co. v. Burkhart (1947), 148 Ohio St. 149 [35 O.O. 166].[6] In Burkhart, the facts show that the parties had been twice married to each other and twice divorced. Prior to the second marriage, an antenuptial agreement was executed which provided that the husband would make a will providing for $300 per month support during the wife's lifetime, plus $1,000 per year for five years, in consideration of her agreement

to waive her statutory rights of inheritance. It appears that the parties remarried and remained so for some thirteen years, when the husband obtained a divorce based upon the wife's gross neglect of duty. Two years later, the husband died. The former wife filed a claim against the executor of the husband's estate, seeking enforcement of the support provisions contained in the antenuptial agreement. The probate court held that the former wife could not enforce the contract. The court of appeals affirmed. Upon review, this court affirmed, holding that:

"A former wife may not enforce the performance of an antenuptial contract which she herself has failed and refused to perform."

It must be noted that Burkhart involved the construction of an antenuptial agreement made in contemplation of death. It did not involve an antenuptial agreement containing provisions for the distribution of property or the award of sustenance alimony upon a divorce or dissolution of the parties. The cases cited by this court in Burkhart concerned the construction of certain provisions within antenuptial agreements made in contemplation of death -- not in regard to a possible divorce of the parties.[7] The court, within the context of those facts, stated at page 152:

"In the instant case the rights the wife agreed to relinquish were those of a surviving spouse. But at the time her former husband died she was not his

wife, and hence had no rights as a surviving spouse to relinquish in consideration for the sums she now claims from his estate. Under the terms of the antenuptial contract it was contemplated that she should remain his wife and perform the marriage obligations of a wife as long as he and she lived.* * *"

We are in agreement with this statement and with the judgment in Burkhart; however, the law emanating from that case seems to have been based upon a multi-faceted foundation. The syllabus law of the case, and a portion of the discussion of the court in the opinion, premised the holding upon the basis that the errant wife could not benefit from the estate of her former husband in that she had vitiated the marriage contract by her own actions and thence violated

the antenuptial contract. As previously set forth, the court also utilized language in the opinion to the effect that inasmuch as there had been a prior divorce, she had no status as a surviving spouse at the time of presenting her claim, and that the parties had included provisions for support of the wife only in the event that the parties were husband and wife at the time of the husband's death. The latter was the reasoning of the probate court which held the agreement was abrogated by the prior divorce.[8] To base the abrogation of the antenuptial agreement upon the prior divorce of the parties, rather than upon the fault of one of the parties, would have been a more viable foundation upon which to have determined the issues in Burkhart.

Upon our considered view and analysis of the very specialized purpose of these types of agreements, i.e., the disposition of property, and provision for support or sustenance alimony at the time that a divorce or separation might take place between the parties, we conclude that a strict application of the law of contracts would not be appropriate. The terms of the instrument are not the only important factors to be considered; the intent of the parties at the time of the execution of the agreement is also of prime importance. The parties here, and others who enter into such instruments, specifically provide for a possible "parting of the twain" by way of divorce or separation. It would seem that some misconduct was contemplated at that time. If there would be

no basic circumstance present which could occasion a separation or divorce of the parties, how could the provisions in the contemplated contract even be meaningful as to either party? Any other view taken of such agreements would undermine and render inane the basic purpose of such agreements. If the parties had intended that the subsequent marital misconduct would extinguish the mutual promises in the agreement, either voiding the provisions or permitting only the one not at fault to enforce such provisions, the parties could very well have made this clear within the terms of the agreement.

Although there seems to be a notable difference of positions across the country upon this issue, there are a number of jurisdictions which hold that

antenuptial agreements containing provisions for property distribution or sustenance allowance are not abrogated, nor held to be unenforceable by the party found to be at fault in a divorce proceeding, unless the language of the contract contains an express provision against such contract. Maloy v. Maloy (Fla. App. 1978), 362 So. 2d 484; Crise v. Smith (1926), 150 Md. 322, 133 A. 110; Sims v. Sims (1971), 186 Neb. 780, 186 N.W. 2d 491.

The enactment in a number of states of so-called "no fault" divorce laws, in conformity with the Uniform Marriage and Divorce Act, ameliorated, if not eliminated, the traditional concept that divorce is a remedy granted to an innocent spouse based upon the marital fault of the other spouse. These types of

statutes provide the so-called pure "no fault" divorce laws. The Ohio General Assembly did not see fit to go quite so far when it passed the Divorce Reform Act of 1974. The Ohio Act, by way of R.C. 3105.61 et seq., provides for the dissolution of the marriage by agreement of the parties which is a form of "no fault" divorce, but it requires a written agreement of the parties regarding custody of any children of the parties, child support, visitation rights, alimony and property division. The Act repealed the common-law defenses of condonation and recrimination, the latter defense being grounded upon the premise that a party seeking a divorce could not obtain one unless he himself was free of fault. Although the Ohio Act does not eliminate the laws relating to

divorce based upon fault of one party that are set forth in R.C. 3105.01,[9] the new Act is a further legislative recognition of the right of married parties to contract regarding a breakdown of a marriage, as had been previously recognized in R.C. 3103.06, with reference to separation agreements and, in both areas, without any regard to the element of fault.

As to this issue, we conclude the better view to be, and so hold, that antenuptial agreements providing for division of property and containing provisions for sustenance alimony, if otherwise found to be valid, are not abrogated as to either party for marital misconduct arising after the marriage.

Having determined the general validity of antenuptial agreements providing

for the disposition and division of property and allowing for sustenance or maintenance at the time of a divorce of the parties, we must now provide for the standards of judicial review of such agreements.

At the outset it must be restated that upon a judicial review of any such agreement, it must meet the general tests of fairness as referred to previously, and must be construed within the context that by virtue of their anticipated marital status, the parties are in a fiduciary relationship to one another. The parties must act in good faith, with a high degree of fairness and disclosure of all circumstances which materially bear on the antenuptial agreement.

Upon the consideration of provisions relating to the division or allocation

of property at the time of a divorce, the applicable standards must relate back to the time of the execution of the contract and not to the time of the divorce. As to these provisions, if it is found that the parties have freely entered into an antenuptial agreement, fixing the property rights of each, a court should not substitute its judgment and end the contract. A perfect or equal division of the marital property is not required to withstand scrutiny under this standard. This is in keeping with this court's standard of review of provisions contained in antenuptial agreements providing for the devolution of property at the time of the death of one of the parties. Hook, supra; Troha, supra; Juhasz, supra.

In the review of provisions in antenuptial agreements regarding maintenance or sustenance alimony, a further standard of review must be applied -- one of conscionability of the provisions at the time of the divorce or separation. Although we have held herein that such provisions in an antenuptial agreement generally may be considered valid, and even though it is found in a given case upon review that the agreement had met all of the good faith tests, the provisions relating to maintenance or sustenance may lose their validity by reason of changed circumstances which render the provisions unconscionable as to one or the other at the time of the divorce of the parties. Accordingly, such provisions may, upon a review of all of the circumstances, be found to

have become voidable at the time of the divorce or dissolution.[10]

We believe that the underlying state interest in the welfare of the divorced spouse, when measured against the rights of the parties to freely contract, weighs in favor of the court's jurisdiction to review, at the time of a subsequent divorce, the terms in an antenuptial agreement providing sustenance alimony for one of the parties. There is sound public policy rationale for not strictly enforcing such a provision which, even though entered into in good faith and reasonable at the time of execution, may have become unreasonable or unconscionable as to its application to the spouse upon divorce. It is a valid interest of the state to mitigate potential harm, hardship, or disadvan-

tage to a spouse which would be occasioned by the breakup of the marriage, and a strict and literal interpretation of the provisions for maintenance of the spouse to be found in these agreements.

One who, by way of a motion for modification, claims the unconscionability of a provision for maintenance within an antenuptial agreement has the burden of showing the unconscionable effect of the provision at the time of divorce or dissolution.[11] The trial court, in determination of the issue of conscionability and reasonableness of the provisions for sustenance or maintenance of a spouse at the time of the divorce, shall utilize the same factors that govern the allowance of alimony which are set forth in R.C. 3015.18.[12]

Applying the law to the facts and circumstances of this case, we find that there is accord that the antenuptial agreement was entered into with all of the factors of good faith and non-over-reaching as previously set forth herein. There also is no question that there was in fact a full disclosure of the assets of the parties as evidence by the list of such assets attached to the agreement. Further, we believe that the provisions of the contract did not promote or encourage divorce, or present a profiteering device for the parties. Here, we are reviewing an antenuptial agreement entered into by the parties who married and lived together as man and wife for fourteen years, which

marriage must have been a harmonious one for a considerable period of time, and one which produced an offspring.

Therefore, the basic agreement in its totality was a valid one when entered into by the parties. In accord with the principles discussed previously, the fact that a divorce was granted to the wife upon the trial court's finding that the husband had been at fault does not abrogate the contract upon which he relies, and does not prevent the husband from enforcing the provisions other than those pertaining to sustenance or maintenance which might be held voidable on behalf of the wife.

Concerning the latter point, the facts would tend to show that, although a comparatively wealthy man at the time

of the execution of the antenuptial agreement, Mr. Gross became a man of considerably greater means during the years of his second marriage. Not only did his stock holdings and value thereof increase markedly, but his net income also substantially increased. The wife's standard of living has changed quite dramatically from the time of the execution of the agreement until the time of the divorce. To require the wife to return from this opulent standard of living to that which would be required within the limitations of the property and sustenance provisions of this agreement, could well occasion a hardship or be significantly difficult for the former wife.

Under the facts here, and in light of the law pronounced in this opinion,

we find the provisions for maintenance within this agreement to be unconscionable as a matter of law voidable by Mrs. Gross. Accordingly, we hold that the provisions within this agreement for maintenance of Mrs. Gross should be reviewed by the trial court, and alternative provisions be ordered by the court.

Accordingly, the judgment of the court of appeals is reversed, and this cause remanded to the trial court for further proceedings in accordance with this opinion.

Judgment reversed and cause remanded.

W. BROWN, SWEENEY and LOCHER, JJ., concur.

CELEBREZZE, C.J., C. BROWN and J.P. CELEBREZZE, JJ., concur in part and dissent in part.

J.P. CELEBREZZE, J., concurring in part and dissenting in part. Justice

Holmes has provided a cogent analysis of the societal changes which dictate that this court adopt a new rule of law recognizing the general validity of divorceoperative antenuptial agreements. This decision will tend to mitigate many of the difficulties often associated with divorce. It allows the parties to plan their own affairs with a minimum of governmental intrusion, yet denies enforcement of any support or maintenance agreement which would work a great injustice.

As to the general validity of antenuptial agreements, and as to conscionability review of support provisions, I wholeheartedly concur. However, I must respectfully part from the path chosen

by the majority which would allow enforcement of unconscionable property settlements.

The traditional justification for the per se invalidity of divorce-operative antenutpial agreements was that the potential for economic gain would encourage divorce.[13] The continued validity of this supposition has been routinely attacked by the commentators.[14] The Supreme Court of Colorado has rejected the traditional argument and stated, "it is unlikely that an otherwise viable marriage would be destroyed because of the potential for economic gain through enforcement of the terms of the antenuptial agrement." Newman v. Newman (Colo. 1982), 653 P. 2d 728, 732. This court now joins the

growing number of progressive jurisdictions which have recognized that antenuptial agreements do not automaticially lead to divorce, but rather may lead to a greater number of harmonious marriages.

While holding that antenuptial agreements are presumptively valid, the majority recognizes that there are limitations to their enforceability. As Justice Holmes states, in quoting from Newman v. Newman, supra, at 734, "the provisions relating to maintenance or sustenance may lose their validity by reason of changed circumstances which render the provisions unconscionable as to one or the other at the time of the divorce of the parties." The majority holds, however, that provisions regarding division of property may not be

attacked or invalidated for unconscionability.[15]

Antenuptial agreements often provide that each party waives any rights he or she may have in property brought to the marriage by the other. Often, as is the case herein, a party wishes to pass certain property to his or her children from a prior marriage, and thus desires that it not be subject to any potential claim.[16] An agreement which waives any claim to such property, accumulated prior to the marriage, through no effort of the waiving spouse, would not be unconscionable. Matlock v. Matlock (1978), 223 Kan. 679, 576 P. 2d 629. However, an agreement which waives any claim of a spouse to property acquired during the marriage, regardless of that spouse's contribution, or any other

circumstance, may be unconscionable. Ranney v. Ranney (1976), 219 Kan. 428, 548 P. 2d 734.

In Ranney, the parties voluntarily entered into an antenuptial agreement which was fairly and understandably made after full disclosure. The Supreme Court of Kansas held that such agreements were not contrary to public policy and should be liberally construed so as to uphold their validity. The court went on to hold, however, that the particular agreement at issue, which would leave the ex-wife with a house and a car, but with no part of the assets acquired through the parties' joint efforts during the eleven-year marriage, was unfair, inequitable, contrary to public policy and unenforceable. Ranney at 433.

The archaic notion that the only contributions of any value to a marriage are those of a wage-earning husband, and not those of a homemaker, has long ago been discarded.[17] An antenuptial agreement which would give economic substance to such a sexist concept would certainly be unconscionable and, for a court to enforce it, unjust. Furthermore, it is unclear whether the contract sub judice was intended to apply to property acquired during the marriage. At a minimum, any ambiguity in the contract should be construed as intending to divide the assets acquire during the marriage in a manner recognizing the substantial economic value of a homemaker's services, rather than in a manner consistent with a stereotype lacking any rational basis.

The holding of the majority may well lead to illogical results. A spouse who saves little and spends recklessly could not be unconscionably deprived of the "opulent standard of living" to which that spouse had grown accustomed. However, the spouse who had saved diligently and spent only for necessities could be deprived of any claim to the savings regardless of conscionability, and would be entitled only to protection from an unconscionable diminution of such spouse's already frugal life style.

Finally, I would concur in the finding that the support provisions of the present agreement are unconscionable. The record establishes that at the time of the marriage, appellee was employed and selfsupporting, but, after fourteen years of dedicated full-time

service as a homemaker, is not presently possessed of skills qualifying her for employment outside the home. As to the facts of this case, support payments of $2,400 per year should be held unconscionable as a matter of law.

CELEBREZZE, C.J., and C. BROWN, J., concur in the foregoing opinion.

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[1]Note, The Antenuptial Contract in Ohio (1978), 28 Case W. Res. L. Rev. 1040.

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[2]Klarman, Marital Agreements in Contemplation of Divorce (1977), 10 U. Mich. J.L. Ref. 397.

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[3]Records quite often show that parties to antenuptial agreements have previously been married, and have children by the prior marriage. The provisions of the agreement generally provide for, and hopefull ensure, the distribution of estate property to children of the prior marriage.

[4]2 Lindey, Separation Agreements and Antenuptial Contracts (Rev. Ed. 1983).

[5]Note, For Better or for Worse... But Just in Case, Are Antenuptial Agreements Enforceable? 1982 U. Ill. L. Rev. 531.

[6]The court of appeals also cited the cases of Kennedy v. Kennedy (1919), 11 Ohio App. 399; and Dearbaugh v. Dearbaugh (1959), 110 Ohio App. 540 [13 O.O. 2d 351]. These cases held that the party found at fault during the divorce proceeding had in effect repudiated the antenuptial agreements made in contemplation of a divorce, and therefore could not rely upon the terms of the contracts.

[7]Becker v. Becker (1909), 241 Ill. 423, 89 N.E. 737; York v. Ferner (1882), 59 Iowa 487, 13 N.W. 630; Veeder v. Veeder (1923), 195 Iowa 587, 192 N.W. 409, 29 A.L,R. 191; New Jersey Title Guaranty & Trust Co. v. Parker (1916), 85 N.J. Eq. 557, 96 A. 574.

[8]Probate Judge Frank Bonham of Hamilton County stated in his opinion regarding this point: "All these rights she was agreeing to relinquish were the rights of a surviving spouse -- those rights, titles and interests she would acquire in his estate, only in the event she married him, and remained his wife until his death. In no other way could she be his surviving spouse at his death. Those rights would then be determined by the law of his domicile in effect at his death. If, at his death, she did not have these rights to relinquish, there was no consideration for his agreement to pay to her the sums he agreed to pay." Southern Ohio Savings Bank & Trust Co. v. Burkhart (May 1, 1946), No. 30909, unreported.

[9]It should be noted that one of the "grounds" for divorce to be found in R.C. 3105.01 has no element of fault, i.e., living apart for one year without interruption and no cohabitation.

[10]We are not called upon here to decide, nor do we decide, whether the trial court has continuing jurisdiction, subsequent to divorce, relative to the amount of alimony ordered pursuant to a conscionability hearing. However, the underlying rationale of Wolfe v. Wolfe (1976), 46 Ohio St. 2d 399 [75 O.O. 2d

474], regarding the breadth of the overview of the trial court in matters of alimony considerations may arguably be applicable to these matters.

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[11]Unconscionability of a provision for maintenance and sustenance contained in an antenuptial agreement may be found in a number of circumstances, examples of which might be an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse.

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[12]R.C.3105.18(B) provides:

"In determining whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors, including:

"(1) The relative earning abilities of the parties;

"(2) The ages, and the physical and emotional conditions of the parties;

"(3) The retirement benefits of the parties;

"(4) The expectancies and inheritances of the parties;

"(5) The duration of the marriage;

"(6) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;

"(7) The standard of living of the parties established during the marriage;

"(8) The relative extent of education of the parties;

"(9) The relative assets and liabilities of the parties;

"(10) The property brought to the marriage by either party;

"(11) The contribution of a spouse as homemaker."

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[13]Clark, Antenuptial Contracts (1979), 50 U. Colo. L. Rev. 141.

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[14]Moore, The Enforceability of Premarital Agreements Contingent Upon Divorce (1983), 10 Ohio N.U.L. Rev. 11; Note, The Antenuptial Contract in Ohio (1978), 28 Case W. Res. L. Rev. 1040; Klarman, Marital Agreements in Contemplation of Divorce (1977), 10 U. Mich. J.L. Ref. 397; Note, For Better or For Worse...But Just in Case, Are Antenuptial Agreements Enforceable? (1982) U. Ill. L. Rev. 531; Clark, Antenuptial Agreement Contracts, supra.

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[15]The majority states that this bar to unconscionability review would be consistent with the standard of review for antenuptial agreements effective at the death of one of the parties. However, none of the cited cases stands for such a proposition. In Juhasz v. Juhasz (1938), 134 Ohio St. 257 [12 O.O. 57], this court held in paragraph two of the syllabus:

"An antenuptial contract voluntarily entered into during the period of engagement is valid with the provisions for the* * *[spouse] is fair and reasonable under all the facts and circumstances."

Under this standard, it would still be possible for a person to receive a disproportionately small share of the spouse's estate, but only if it would be fair and reasonable under the facts and circumstances. Such circumstances may exist when the disinherited spouse has substantial wealth of his or her own and the deceased spouse had children from a prior marriage who would be natural claimants to his or her bounty. See Hook v. Hook (1982), 69 Ohio St. 2d 234 [23 O.O. 3d 239]; Troha v. Sneller (1959), 169 Ohio St. 397 [8 O.O. 2d 435].

In Hook v. Hook, supra, this court recently affirmed the Juhasz requirement that antenuptial agreements regarding disposition of property at death be fair and reasonable under the circumstances. It would seem incongruous to suggest, as does the majority, that enforcement of unconscionable agreements would be

consistent with the invalidation of those that are unfair or unreasonable.

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[16]Note, The Antenuptial Contract in Ohio, supra.

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[17]The legislature has recognized the value of the homemaker's contributions in R.C. 3105.18(B)(11) which requires the court to consider the value of such services when determining alimony.

APPENDIX 7-A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1984 TERM
City of Columbus)To wit: June 13, 1984

Ida Jane Gross, Appellee	)	No. 83-564
vs.	)	APPEAL FROM THE
Thomas R. Gross, Appellant.	)	COURT OF APPEALS for Franklin County

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed and cause remanded for the reasons set forth in the opinion rendered herein.

It is ordered and adjudged, also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Court of Common

Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____, 19____.

_____, Clerk

_____, Deputy

APPENDIX 7-B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1984 TERM
City of Columbus)To wit: June 13, 1984

Ida Jane Gross,) No. 83-564
Appellee)
vs.) MANDATE
Thomas R. Gross,)
Appellant.) for Franklin County

To the Honorable Court of Common Pleas

Within and for the County of Franklin, Ohio, Greetings:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals reversed and cause remanded for the reasons set forth in the opinion rendered herein.

James Wm. Kelly,
Clerk

_____, 19_____
_____, Deputy

Docket Fee	$20.00	Paid by	Geoffrey V. Case
Docket fee	$_____	Paid by	_____
Docket Fee	$_____	Paid by	_____
Printing Record	$_____	Paid by	_____
Supplemental Record	$_____	Paid by	_____
Sheriff's Costs	$_____	Paid by	_____
Sheriff's Costs	$_____	Paid by	_____

APPENDIX 8

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ida Jane Gross, Plaintiff-Appellant,	:	No. 82AP-741
v.	:	(REGULAR CALENDAR)
Thomas R. Gross, Defendant-Appellee.	:	

O P I N I O N
Rendered on February 10, 1983

MESSRS. BROWNFIELD, BOWEN & BALLY, MR. C. WILLIAM BROWNFIELD, and MR. WILLIAM H. ARNOLD, for appellant.

MR. GEORGE W. GROSS, for appellee.

APPEAL FROM THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, DIVISION OF DOMESTIC RELATIONS

NORRIS, J.

Plaintiff appeals from a judgment of the trial court which granted her a divorce from defendant on the ground of extreme cruelty, terminating their marriage of almost fourteen years, but found that alimony, property settlement,

and expense money were limited by the provisions of an antenuptial agreement between the parties.

The antenuptial agreement contained these provisions:

> "In consideration of the marriage of the parties hereto and of the mutual promises and agreements herein it is agreed that:
>
> "* * *
>
> "6. The parties * * * desire prior to their marriage to agree as to what rights each shall have in the property of the other during this marriage, in the event of the termination of this marriage, or in the event of the death of either of the parties.* * *
>
> "* * *

"10. The parties understand that in the event of a divorce* * *Jane in the absence of an agreement between the parties would have the right to have a court of competent jurisdiction determine an amount of alimony for her support * * *.

"* * *

"11. The parties* * *agree that neither shall have any interest in the property of the other except as specifically set out hereinafter.

"* * *

"13. Jane shall after the consummation of the marriage between the parties hereto, in the event of the* * *

divorce of the parties be entitled to receive as alimony* * *the maximum sum of $200.00 per month for a

period of 10 years,* * *if a court of competent jurisdiction will award Jane any alimony. This shall be the maximum amount Jane shall be entitled to receive under any and all circumstances and conditions, and Jane shall not be entitled to any division of the property of Thomas nor to any expense money or counsel fees in connection with any * * * divorce, and Jane agrees to waive any and all such rights or claims. Further Jane specifically releases all her rights of dower in the property of Thomas.

"* * *

"15. Thomas agrees that he shall by Will or by intervivos trust, create * * * trust with Jane as beneficiary * * *which trust shall provide for a

principal in said trust of the sum value of $200,000.00 or 20% of Thomas' net estate after taxes whichever amount is lesser.* * *

"16. In the event of a divorce the personal residence of the parties shall be sold and the equity therein realized, shall be divided equally between the parties.

"17. In the event of a divorce the personal property and possessions of the parties located in their residence shall be the property of Jane with the exception of Thomas' clothing, sports equipment and other purely personal items. Jane shall be entitled to the ownership of one automobile out of Thomas' property.

"18. Thomas agrees to support Jane as long as they shall live together* * *.

"* * *

"20. This agreement shall become effective only upon the consummation of the proposed marriage between the parties * * *.

"* * *"

The trial court found that the antenuptial agreement was enforceable and adopted and enforced it.

Plaintiff raises six assignments of error:

"I. The trial court erred in holding that an antenuptial agreement entered into prior to a fourteen-year marriage prevented the trial court from making an equitable division of property and an award of alimony pursuant to Sec. 3105.18 of the Ohio Revised Code, after having granted appellant-wife a divorce on the ground of extreme cruelty.

"II. The trial court erred in holding that an antenuptial agreement entered into prior to a fourteen-year marriage applied to property which had been acquired by the parties during their marriage as marital assets but placed by husband in his name only.

"III. The trial court's entry of judgment resulted in a taking of appellant-wife's property without due process of law in violation of the Ohio Constitution and the Constitution of the United States.

"IV. The trial court erred in failing to award attorneys' fees to the appellant.

"V. The trial court erred in incorporating into its decree, provisions of the antenuptial agreement executed by the parties fourteen years prior to the

divorce which purported to set the amount of alimony awardable to the plaintiff-wife upon divorce, such provisions being void as against public policy.

"VI. The trial court erred in entering the judgment in this case without having examined and reviewed the December 31, 1980 financial statement of the parties."

The first, second, fourth, and fifth assignments of error essentially deal with the same question -- did the trial court err in giving effect to the provisions of an antenuptial agreement which limited alimony, equitable division of property, and expense money?

At an early date, our Supreme Court declared that public policy favors antenuptial agreements which provide arrange-

ments for the enjoyment of property during marriage, or at the death of one of the spouses, on the basis that these agreements tend to promote domestic happiness by removing a frequent cause of family disputes. Stilley v. Folger (1846), 14 Ohio 610. There appears to be virtual unanimity among the jurisdictions in this country on that point. Accordingly, most litigation has centered around the validity of antenuptial agreements at their inception in situations where application of an antenuptial agreement is questioned by a surviving spouse who would receive a larger share of the deceased spouse's estate in the absence of such an agreement.

But, when the purpose of the antenuptial agreement is not only to provide for the enjoyment of property during coverture or upon death of the spouse, but also

upon separation or divorce, unanimity dissolves. It appears that the majority rule in this country is that an antenuptial agreement which provides for or facilitates divorce is contrary to public policy and therefore void. See, 24 American Jurisprudence, 2d 187, Divorce and Separation, Section 12; 2 Lindey, Separation Agreements and Antenuptial Contracts 33, Section 90 (Rev. 1982). In the majority of jurisdictions, then, any provision in an antenuptial agreement for alimony or a property settlement in the event the marrriage terminates is generally held to be unenforceable.

Although Ohio has not adopted the majority rule in the extent that any antenuptial agreement providing for alimony or property settlement is void as being against public policy, Ohio courts have

refused to enforce such an agreement under circumstances where the party seeking enforcement has breached the agreement by conduct that under general contracts law would entitle the other party to rescission.

For example, in Kennedy v. Kennedy (1919), 11 Ohio App. 399, the wife obtained a divorce on the ground of gross neglect of duty and was awarded alimony by the trial court; her husband appealed, contending that alimony was precluded by an ante-nuptial agreement. The agreement provided that the husband would support the wife so long as they were husband and wife; that property brought to the marriage would remain separate property but property accumulated during the marriage would be joint property; and that, if for any reason the parties should not live as husband and wife, then, the wife would have no interest

in the husband's separate property, but would have an interest in property acquired during the marriage through joint efforts. The parties had lived together one and one-half years and then separated. The Court of Appeals refused to enforce the antenuptial agreement against the wife, holding that:

> "* * *The trial court having found that the husband was guilty of such gross neglect of duty as entitled the wife to a divorce and alimony, and this court having found that such judgment is sustained by sufficient evidence, it necessarily results that the husband himself was guilty of a breach, not only of the marital relations but of the ante-nutpial contract whereby he

had promised to support and care for the wife." [Kennedy v. Kennedy, supra, at 401.]

Refusal by the Court of Appeals to enforce the antenuptial agreement was based upon contracts law, as opposed to public policy. The court's logic is unassailable: but for the husband's breach, the provisions of the antenuptial agreement would have continued in force and the wife would have continued to enjoy his support. Under those circumstances, she was, in effect, entitled to rescind her side of the bargain.

The Supreme Court was faced with a similar consideration, under distinctly different circumstances, in Southern Ohio Savings Bank & Trust Co. v. Burkhart (1947), 148 Ohio St. 149. In that case, a husband and wife had entered into an antenuptial agreement in which the husband had

agreed to make a will providing for $300 per month support during the wife's life-time, plus $1,000 per year for five years, presumably in return for her agreement to waive her staturory right of inheritance. Thirteen years later, he was granted a divorce on the ground of gross nelgect of duty, and two years later he died. She filed a claim against the executor of his estate, seeking enforcement of the support provision of the antenuptial agreement. The Supreme Court held that the wife could not enforce performance of a contract she herself had failed to perform.

> "* * *Under the terms of the ante-nuptial contract it was contemplated that she should remain his wife and perform the marriage obligations of a wife as long as he and she lived. This she failed and refused to do, as is

evidenced by the record which includes a divorce decree granted her husband by reason of her aggression in the form of gross neglect of duty.* * *" [Southern Ohio Savings Bank & Trust Co. v. Burkhart, supra, at 152.]

In Dearbaugh v. Dearbaugh (1959), 110 Ohio App. 540, the Court of Appeals for Shelby County considered almost the precise question which is before us. There, the wife had been granted a divorce upon the ground of extreme cruelty and had also been awarded alimony, despite an antenuptial agreement in which each spouse relinquished all rights, present and future, in the property of the other, including all rights which might accrue by virtue of the marriage. The Court of Appeals affirmed the trial court's award of alimony, viewing as determinative the holding of Southern Ohio

Savings Bank & Trust Co. v. Burkhart, supra, that a spouse who breached an antenuptial agreement by failing to perform the obligations of his marriage cannot enforce its performance. The opinions in both Burkhart and Dearbaugh place reliance upon the fact that marriage was the consideration for, and thus a term of, the antenuptial agreements, and that that term of the agreement was breached by the party seeking to enforce the antenuptial agreement.

In this case, the trial court relied upon the decision of the Court of Appeals for Warren County in Benza v. Benza (Mar. 29, 1978), No. 171, unreported, in rejecting the rationale of Kennedy v. Kennedy, supra, and Dearbaugh v. Dearbaugh, supra. In Benza, the judgment of the trial court, enforcing an antenuptial agreement which

precluded alimony, was affirmed. Although th Court of Appeals in Benza was presented with the issue with which we are concerned, it did not directly decide the issue because the antenuptial agreement in that case had been determined to be valid and binding in a previous action, from which no appeal had been taken. The Court of Appeals also believed that the trial court lacked equity jurisdiction, based upon the repeal of R.C. 3105.20. Actually, that determination was erroneous, in view of the restoration of equity jurisdiction in 1975 by enactment of R.C. 3105.11. In addition, the Court of Appeals did not address the authorities cited above. We also note that in Benza the court observed that it might have been compelled to declinde enforcement of the antenuptial agreement had there been, during the marriage, a substantial increase

in the value of property held by the spouse seeking enforcement of the agreement; those circumstances do exit in this case. For all these reasons, we do not find persuasive defendant's agrument that the trial court's action in this case is supported by Benza.

Accordingly, we are persuaded by the rationale of the Kennedy and Dearbaugh cases, and are bound by the Supreme Court's opinion in Southern Ohio Savings Bank & Trust Co. Because defendant's conduct amounted to a breach of the marital relationship and therefore of the antenuptial agreement, he will not be permitted to enforce its provisions which limit plaintiff's entitlement to alimony, property settlement, and expense money. Certainly the equities surrounding the circumstances of this case -- where the parties prospered financially during a marrriage which was of

long duration, and the party seeking to enforce the antenuptial agreement was the clear agressor in causing the breakup of the marriage -- argue for the continuing vitality and application of this rule of law.

The position we have adopted does not preclude enforcement of every provision in an antenuptial agreement which provides for alimony or property settlement in the event of a termination of the marital relationship, other than by death. Such provisions may be enforceable, for example, by the spouse victimized by the breach of the marital relationship, or where the marriage is terminated by dissolution or by use of the "living apart statute" [R.C. 3105.10(K)] where the facts of the separation do not constitute a breach of the marital relationship; at least where the agreement is

not one which promotes divorce. See, Restatement of Contracts 2d, Section 190(2) (1981).

The first, second and fourth assignments of error are sustained. The fifth assignment of error is sustained to the extent that the trial court erred in incorporating the antenuptial agreement into its decree, but is overruled as to its contention that the antenuptial agreement was void as being against public policy.

The third assignment of error is overruled as the circumstances of this case do not present a question of the taking of property without due process of law; the decree addressed the equitable division of property based upon the concept of fairness, as contrasted with a determination of property rights.

The sixth assignment of error is overruled. Near the beginning of the first day of the two-day trial, defendant was testifying on cross-examination concerning a financial report dated December 31, 1979. Plaintiff's counsel asked defendant if he would furnish a report, dated December 31, 1980, which defendant said he had in his files. Defense counsel objected on the basis that the report had not been subpoenaed, at which point the trial court injected this comment:

> "* * *Well, if we don't get finished today, perhaps you could bring it in tomorrow. I'm not going to require you to go home and get it this afternoon."

As we are unable to find any reference in the transcript to any subsequent attempt by plaintiff's counsel to utilize the report and no objection was lodged to its

absence the following day, we are unable to say that the trial court erred in failing to examine and review the report.

The third and sixth assignments of error are overruled; the first and second assigments of error are sustained; the fourth assignment of error is sustained to the extent that the trial court may have relied upon the antenuptial agreement in denying expense money; the fifth assignment of error is sustained in part and overruled in part; the judgment of the trial court is reversed; and this cause is remanded to the trial court with instructions to consider the questions of alimony, property settlement, and expense money in a manner consistent with this opinion.

Plaintiff has filed a motion seeking the allowance by this court of expense money. In view of our disposition of the

fourth assignment of error, we overrule the motion, confident that the trial court is better equipped to consider the question of expense money under all the circumstances of this case, including the appeal.

Judgment reversed and cause remanded with instructions. Motion overruled.

WHITESIDE, P.J., concurs.
MOYER, J., concurs in judgment only.

MOYER, J., concurring separately.

While the antenuptial agreement executed by plaintiff and defendant in this case could be treated as any other contract which contains a provision defining the rights of the parties if the contract is breached, the common law of this state has interceded to produce a different result in the interest of what some courts have perceived to be public policy. The few

times the courts of this state have considered the issue presented by this appeal they have developed a rule of law that replaces the words of an antenuptial agreement which state the intention of the parties, in the event they are separated or divorced, with a public policy that is purportedly created to preserve the institution of marriage.

Because of the breadth of the rule of law developed by the Supreme Court in Southern Ohio Savings Bank & Trust Co. v. Burkhart, supra,[1] it is not possible to remove this case from its application. Such an inflexible and all-encompassing rule of law should be examined by the Supreme Court, particularly in light of the fact that the Supreme Court has apparently not

considered the issue since 1947. As stated in Restatement of Contracts 2d 55, Section 190(2c) (1979):

> "* * *Because of the public interest in the marriage relationship (see Comment a), a promise that undermines that relationship by tending unreasonably to encourage divorce or separation is uneforceable* * *Whether a promise tends unreasonably to encourage divorce or separation in a particular case is a question of fact that depends on all the circumstances, including the state of disintegration of the marriage at the time the promise is made. A promise that merely disposes of property rights in the event of divorce or separation does not of itself tend unreasonably to encourage either." (Emphasis added.)

As a minimum, the Supreme Court should

provide that an antenuptial agreement that provides for the disposition of the parties' property upon separation or divorce should be given the force of law if it is determined factually that the agreement did not encourage the separation or divorce of the parties who entered into the agreement.

The facts of the case sub judice are a strong argument for a change in the current law of Ohio. It is clear from the evidence that both parties were represented by competent counsel when they executed the antenuptial agreement, that counsel for plaintiff advised his client not to sign the agreement and that the agreement was changed at the request of plaintiff's counsel. As the trial court emphasized, the terms of the consideration, one of which was the marriage of the parties, were

fulfilled for a lengthy period of time. The parties remained married for thirteen years. The agreement expressly provides for a disposition of the property of the parties, including alimony payments in the event of a divorce without referring to the fault of either party. A contract executed by two adults after full disclosure by each and after each has had an opportunity to negotiate the contract should be given its intended effect.

The law should at least permit the trial court to receive evidence to determine whether the provisions of the agreement encouraged the breakup of the marriage. Again, this case is significant on its facts because a review of the record leads one to the conclusion that factors other than a disporportionate division of property in favor of defendant caused the

marital relationship of the parties to disintegrate. In other words, the antenuptial agreement, which by the passage of time became more favorable to defendant than it was when it was executed, was not an incentive to defendant to act in the manner described in the transcript, thereby creating the grounds for divorce.

Furthermore, the testimony reveals that defendant would not have entered the marriage without the antenuptial agreement and that plaintiff signed the agreement because she wanted to be married to defendant. It could be argued that, rather than destroy a marriage relationship, the antenuptial agreement in this case enabled a marriage to occur which may not have otherwise occurred and which, in fact, endured for thirteen years.

Because I believe the broad statement of law in Southern Ohio Savings Bank & Trust Co. v. Burkhart, supra, applies to this appeal, I concur in the judgment herein. However, I also believe that the common law rule should be refined in order that it may be applied more realistically to a case such as the case before us, and therefore do not concur in the reasoning that produced the judgment.

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[1]In Southern Ohio Savings Bank & Trust Co. v. Burkhart, the Supreme Court did not state in its opinion that the antenuptial agreement contained a provision that contemplated the parties' separation or divorce.

APPENDIX 9

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ida Jane Gross, Plaintiff-Appellant,	:	
v.	:	No. 82AP-741
Thomas R. Gross, Defendant-Appellee.	:	(REGULAR CALENDAR)

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on February 10, 1983, assignments of error 1 and 2 are sustained; assignment of error 4 is sustained to the extent that the trial court may have relied upon the antenuptial agreement in denying expense money; assignment of error 5 is sustained in part and overruled in part; and assignments of error 3 and 6 are overruled; and plaintiff's motion seeking the allowance by this court of expense money is overruled; and it is the judgment and order of this court that the judgment of the Franklin County Court of

Common Pleas, Division of Domestic Relations, is reversed, and this cause is remanded to that court with instructions to consider the questions of alimony, property settlement, and expense money in a manner consistent with said opinion.

WHITESIDE, P. J., and
NORRIS, JJ.
MOYER, J., concurring in
judgment only.

By_____
Judge Alan E. Norris

cc: C. William Brownfield
and William H. Arnold
George W. Gross

APPENDIX 10

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

IDA JANE GROSS, Plaintiff,	Monday May 10, 1982
vs.	No. 81-DR-06-1712
THOMAS R. GROSS Defendant.	

DECISION

The Court finds that sufficient corroborated evidence has been presented to find that the defendant has been guilty of the grounds of extreme cruelty and that by reason of the same the plaintiff is entitled to a divorce on that grounds. The plaintiff therefore is granted a divorce from the defendant.

The Court also finds that the best interest of the minor child will be served by placing custody with the mother. The father is granted reasonable rights of visitation with said child.

The defendant is to pay as support for said child the sum of $500.00 per month.

The Court coming now to consider the question of alimony and a division of the property of the parties, finds that the parties entered into an agreement shortly before their marriage in the nature of an antenuptial agreement. The evidence clearly disclosed to the Court that the agreement was entered into voluntarily by both parties after consultation and after obtaining advice of counsel. The Court further finds that the defendant made a complete and full disclosure of the nature, extent and value of his property to the plaintiff and that she had full knowledge at the time of the execution of this agreement of the defendant's property.

The provisions made for her in the agreement at the time of the execution were

fair and reasonable for the plaintiff at the time the agreement was executed and would have been completely equitable if the parties had terminated their marriage shortly after it was entered into. This did not happen, the marriage existed for over 13 years before this action for divorce was filed. Today, after over 13 years and some increase in the values of the property, the provisions of the contract seem to be disproportionate.

The Supreme Court of Ohio has held in the case of Juhasz vs. Juhasz, 134 Ohio State 257: "Although the provisions made for the intended wife in antenuptial contract is wholly disproportionate, she will be bound by voluntarily entering into the contract after full disclosure or with full knowledge..." This holding was again followed by the Supreme Court of Ohio in the

recent case of Hook vs. Hook, 69 Ohio State 2d 234. The parties therefore have a binding antenuptial agreement.

These Supreme Court cases deal with probate situations and rights of inheritance from the other contracting party and are not domestic relation cases.

This leaves the question as to whether this Court is bound by the terms of the agreement in this case and thereby precluded from granting plaintiff property and alimony beyond that provided for in the agreement.

There is very little case law in Ohio that deals with this question. No Supreme Court cases, no appellate cases from our appellate district, and only a few appellate cases, two of which are from Cuyahoga County Court of Appeals exist. Kennedy vs. Kennedy, 11 Ohio Appeals 399, (decided

1911) and Dearbaugh vs. Dearbaugh, 110 Ohio Appeals 540 (decided 1959). These two cases, both of which were decided some time ago, held that since the defendant had breached the marital relations by being guilty of grounds that this constituted a breach of the consideration for antenuptial agreement and therefore a breach of the agreement.

In the case at bar the parties were married and lived in the marital relationship for a number of years. The terms of the consideration were fulfilled for a lengthy period of time. The agreement in the case at bar specifically provided for the event of a divorce without pointing the finger at fault. The agreement provided exactly what distributions of the property should be made and what alimony in such eventuality should be paid.

The recent unreported case from first district court of appeals would appear to be on all fours with the case at bar. Benza vs. Benza, Case #171, decided March 29, 1978, a copy of which is attached to this decision.

In effect this case holds that in the absence of fraud, misrepresentation, duress or the like, the parties must be held to their contract. The evidence of this case did not indicate any fraud, misrepresentation or duress. This decision, coupled with the recent Supreme Court decisions previously cited, tells us this is an enforceable contract whether the matter is a probate court case or a domestic relations case. This would seem to be the more reasonable position in view of the law governing separation agreements and places antenuptial agreements in the same position. It

also is the more reasonable view in todays law that no longer places the women in a category similar to imbeciles and minors which would necessitate some special protection in the law. Today a woman should be and is treated in the law on an equal basis with the man.

The antenuptial agreement is therefore adopted and ordered enforced.

The Court further finds that the property placed in the plaintiff's name during the course of the marriage are gifts to her and her property even though the funds may have originated out of non-marital property.

Pursuant to Paragraph 16 of the said agreement, the Court orders the property located on Cambridge Blvd. sold; the expenses of sale and mortgage paid and the balance of the proceeds divided. The Court grants the parties a ninety day period in

which to accomplish this sale by a private sale. In the event that this cannot be accomplished, either party may apply to the Court for further order of sale and the property will be sold at public auction following the procedures in partition sales.

Pursuant to Paragraph 16, the defendant is awarded clothes, sports equipment and other personal items from the Cambridge Blvd. residence. Plaintiff is awarded the balance of the personal property located therein. The plaintiff is also awarded an automobile out of Thomas' property.

_____
Clayton W. Rose, Judge

cc: Windell F. Fisher
Attorney for Plaintiff
George W. Gross
Attorney for Defendant

APPENDIX 11

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

IDA JANE GROSS, Plaintiff,	Monday May 10, 1982
vs.	No. 81-DR-06-1712
THOMAS R. GROSS Defendant.	

JUDGMENT ENTRY-DECREE OF DIVORCE

This matter came on for trial on January 28, 1982 on the Complaint of the plaintiff, the Answer and Counterclaim of the defendant, and the evidence.

The Court finds that the plaintiff has been a resident of the State of Ohio for at least six (6) months prior to the commencement of this action; that the parties were married as setforth in the Complaint; and that one child, Michael, was born as issue of said marriage.

The Court further finds from the evidence that the defendant has been guilty of

extreme cruelty and from the reason thereof, plaintiff is entitled to a divorce.

The Court further finds that the parties entered into an Antenuptial Agreement dated September 4, 1968, which Antenuptial Agreement the Court finds to be valid and enforceable.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the marriage contract heretofore existing between the plaintiff, Ida Jane Gross and the defendant, Thomas R. Gross, be, and the same hereby is terminated and both parties are released from the obligations of the same.

It is further ORDERED, ADJUDGED and DECREED by the Court that the plaintiff shall have the care, control and custody of the minor child of the parties, subject to reasonable visitation rights on behalf of the defendant.

It is further ORDERED, ADJUDGED and DECREED by the Court that defendant shall pay to the plaintiff the sum of Five Hundred ($500.00) per month for child support until further order of the Court.

It is further ORDERED, ADJUDGED and DECREED by the Court that the Antenuptial Agreement attached hereto and made a part hereof be adopted and enforced.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant shall pay to the plaintiff the sum of Two Hundred ($200.00) per month as and for alimony for a period of ten (10) years from the date hereof or sooner in the event that plaintiff's remarriage or death or upon the death of defendant.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff shall retain as her sole and exclusive property any securi-

ties and any other properties placed in Plaintiff's name, during the course of the marriage.

It is further ORDERED, ADJUDGED and DECREED that the residence of the parties located on Cambridge Boulevard be sold, and after paying the expenses of sale and the mortgage balance, the proceeds shall be divided equally.

It is further ORDERED, ADJUDGED and DECREED that the parties shall have a ninety (90) day period to accomplish the sale of the residence, by private sale, and in the event this cannot be accomplished, either party may apply to the Court for an order of sale and the property will be sold at public auction following the procedures in partition sales.

It is further ORDERED, ADJUDGED and DECREED that the defendant shall retain as

his sole and exclusive property all of his clothing, sports equipment and other personal items remaining at the Cambridge Boulevard residence.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff shall retain as her sole and exclusive property the balance of the personal property located in the residence.

It is further ORDERED, ADJUDGED and DECREED that the plaintiff shall be granted an automobile out of the property of the defendant.

It is further ordered that the defendant pay the costs of this action.

This order is effective May 10, 1982.

_____

Clayton W. Rose, Jr.,
Judge

APPROVED:

_____

Windell F. Fisher
50 West Broad Street
Columbus, Ohio 43215
(614) 228-4210
Attorney for Plaintiff

and

_____

George W. Gross
8 East Broad Street
Columbus, Ohio 43215
(614) 221-7831
Attorney for Defendant

APPENDIX 12

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ida Jane Gross, Plaintiff-Appellant,	:	
v.	:	No. 82AP-741
Thomas R. Gross, Defendant-Appellee.	:	(REGULAR CALENDAR)

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. I

The trial court erred in holding that an antenuptial agreement entered into prior to a fourteen-year marriage prevented the trial court from making an equitable division of property and an award of alimony pursuant to §3105.18 of the Ohio Revised Code, after having granted appellant-wife a divorce on the ground of extreme cruelty.

ASSIGNMENT OF ERROR NO. II

The trial court erred in holding that an antenuptial agreement entered into prior to a fourteen-year marriage applied to property which had been acquired by the

parties during their marriage as marital assets but placed by husband in his name only.

ASSIGNMENT OF ERROR NO. III

The trial court's entry of judgment resulted in a taking of appellant-wife's property without due process of law in violation of the Ohio Constitution and the Constitution of the United States.

ASSIGNMENT OF ERROR NO. IV

The trial court erred in failing to award attorneys' fees to the appellant.

ASSIGNMENT OF ERROR NO. V

The trial court erred in incorporating into its decree, provisions of the antenuptial agreement executed by the parties fourteen years prior to the divorce which purported to set the amount of alimony awardable to the plaintiff-wife upon divorce, such

provisions being void as against public policy.

ASSIGNMENT OF ERROR NO. VI

The trial court erred in entering the judgment in this case without having examined and reviewed the December 31, 1980 financial statement of the parties.

APPENDIX 13

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ida Jane Gross, Plaintiff-Appellant:		No. 85AP-32 (REGULAR CALENDER)
v.	:	
Thomas R. Gross, Defendant-Appellee.:		

ASSIGNMENTS OF ERRORS

FIRST ASSIGNMENT OF ERROR

The trial court erred upon remand in refusing to consider issues pertaining to the ownership and division of property, to an award of attorneys' fees and expenses, and to the general validity of the antenuptial agreement at issue, where such issues had been timely raised as assignments of error by the plaintiff upon her first appeal, had been sustained and the cause remanded by the Court of Appeals, and had not been thereafter otherwise adjudicated by the Ohio Supreme Court.

SECOND ASSIGNMENT OF ERROR

The trial court erred, both upon original trial of this action and upon remand, in refusing to award Plaintiff her lawful interests in the marital property of the parties, or the value thereof, pursuant to the terms of the antenuptial agreement at issue and the provisions of R.C. 3105.18.

THIRD ASSIGNMENT OF ERROR

The trial court erred, both in the original trial of this divorce action and upon remand, in refusing to award Plaintiff maintenance alimony in the form of attorneys' fees, costs and expenses of litigation.

FOURTH ASSIGNMENT OF ERROR

The trial court abused its discretion upon remand hearing in making a wholly insufficient maintenance alimony award to the Plaintiff.

FIFTH ASSIGNMENT OF ERROR

The trial court erred upon remand hearing of this case in refusing to award the Plaintiff an automobile designated by her out of the property of the Defendant, having previously determined that such automobile designation was pertinent to the remand proceedings and that the award of an automobile was proper generally.

SIXTH ASSIGNMENT OF ERROR

The trial court erred in refusing to consider as pertinent to the remand proceedings conducted herein the Defendant's failure to have created the trust required under Paragraph 15 of the antenuptial agreement, which had been assigned as error to the Franklin County Court of Appeals in the initial appeal of this action and sustained by the appellate court.

APPENDIX 14

IN THE SUPREME COURT OF OHIO

Ida Jane Gross, Plaintiff-Appellee	:	
v.	:	NO. 83-564
Thomas R. Gross, Defendant-Appellant.	:	

DEFENDANT-APPELLANT'S PROPOSITIONS OF LAW

---

1. An antenuptial agreement which provides in event of divorce or dissolution for disposition or division of property and for alimony for sustenance is not void per se as being repugnant to public policy.

2. An antenuptial agreement which provides in the event of divorce or dissolution for disposition or division of marital or non-marital property and for alimony for sustenance is enforceable according to its terms, without regard to the grounds upon which, or the party against

whom, divorce is granted, where such agreement was entered without fraud, duress, coercion, or overreaching, was entered after full disclosure or with full knowledge of the nature, value, and extent of the prospective spouse's property, and does not promote or encourage divorce or profit by divorce.

PLAINTIFF-APPELLEE'S PROPOSITIONS OF LAW

I. Summary of Appellee's Argument.

II. Appellee's response to Appellant's First Proposition of Law.

III. A spouse who has breached the marriage contract by extreme cruelty to the other spouse and has breached the antenuptial agreement executed by the parties cannot enforce a forfeiture clause contained in such antenuptial agreement against the

other spouse in a divorce action.

IV. The antenuptial agreement entered into prior to the 14-year marriage did not apply to property which had been acquired by the parties during their marriage as marital assets but placed by husband in his name only.

APPENDIX 15

THE SUPREME COURT OF OHIO
COLUMBUS

- - -

1985 TERM
To wit: December 11, 1985

Ida Jane Gross,	:	
Appellant,	:	
v.	:	Case No. 85-1703
Thomas R. Gross,	:	
Appellee.	:	

PROPOSITIONS OF LAW
OHIO SUPREME COURT

PROPOSITION OF LAW NO. 1

Where the terms of an antenuptial agreement containing restrictions upon the payment of maintenance alimony do not meet the test of conscionability set forth in Gross v. Gross (1984), 11 Ohio St. 3d 99, the trial court abuses its discretion in awarding only $2,500.00 per month in maintenance to a spouse who, despite an opulent standard of living during marriage, was awarded little property upon divorce, had virtually no income and had been unemployed outside the

home over the fourteen year term of the parties' marriage, had been awarded permanent custody of the parties' minor child for which only $500.00 a month in child support had been ordered, and was obligated to pay substantial attorneys' fees and expenses reasonably incurred in connection with litigation of the action, where the other spouse at the time of divorce had a net worth of more than $6,000,000.00, assets of more than $8,000,000.00, was earning personal annual income of at least $359,887.00, and enjoyed the security of employment in his family-owned businesses.

PROPOSITION OF LAW NO. 2

Where an antenuptial agreement does not contain objective language by which the parties' marital property may be distinguised from their nonmarital property except by reference to an attached listing

of specific assets and the values thereof, both spouses possess rights of ownership in all property acquired during marriage by means not derived from the sale or exchange of the non-marital assets listed, and a distribution thereof must be made by the court upon divorce pursuant to the provisions of R.C. 3105.18.

PROPOSITION OF LAW NO. 3

A trial court's refusal to award reasonable costs of litigation and attorneys' fees to one spouse following a remand hearing held to determine maintenance alimony pursuant to Gross v. Gross (1984), 11 Ohio St. 3d 99, is not properly justified on the ground that the maintenance arrearage, awarded retroactively in lump sum, created a source of funds sufficient for that purpose where the alimony arrearage payment was calculated without assessment of interest and at

a monthly rate of less than recepient's living expenses, including funds for payment of taxes, and where the ability of the other spouse to pay those expenses and fees greatly exceeds that of the first, the expense and fee obligations were reasonably generated, and the legal position was based upon pre-existing principles of law.

PROPOSITION OF LAW NO. 4

Language contained in an antenuptial agreement under which one of the parties is required to create an inter vivos or testamentary trust for the benefit of the other following marriage is a material provision of the agreement, and the failure or refusal of that party to create the trust prior to divorce renders the antenuptial agreement unenforceable against the other.

APPENDIX 16

AGREEMENT

This agreement entered into at Columbus, Ohio, this 4th day of September, 1968, by and between Ida Jane Lambert, hereinafter referred to as "Jane" and Thomas R. Gross, hereinafter referred to as "Thomas".

In consideration of the marriage of the parties hereto and of the mutual promises and agreements herein it is agreed that:

1. The parties have known each other socially and in a business relationships (Jane was employed as Thomas' secretary) for a period of more than four (4) years.

2. The parties are well acquainted with the personal and financial affairs of the other.

3. The parties have each been previously married and now each divorced. The parties are now and have both been for

years gainfully employed and have each supported themselves.

4. The parties each have children by their previous marriages. Jane has two (a boy, David, 8 years of age, and a girl, Deborah, 7 years of age), and Thomas has two boys, aged 7 and 5 years.

5. Thomas is 32 years of age and Jane is 27 years of age.

6. The parties are now contemplating marriage to each other and have agreed after a complete disclosure to each other of the property, assets and possessions of the other, as set out herein, that because of their age, their maturity, their children, and their families, their previous marriages, that they desire prior to their marriage to agree as to what rights each shall have in the property of the other during this marriage, in the event of the

termination of this marriage, or in the event of the death of either of the parties. Thomas is particularly interested in seeing that his stock in the family business shall go unencumbered to his sons.

7. The parties have made and attached to this agreement and made apart hereof, a list of the assets of each as of the date of this agreement and the approximate value of these assets as best as can be determined, realizing the fluctuating value of some of these assets from day to day.

8. The parties are both represented by counsel of their own individual choice who have fully explained the consequences of this agreement and the rights of the parties in the property of the other under all circumstances in the absence of this agreement. The counsel for the parties have witnessed this agreement, as evidence that

they have fully explained to their respective clients the consequence thereof.

9. The parties each understand that in the absence of this agreement, Jane would have the right to an exempt estate, a year's allowance, the use of the mansion house for one year and the right to an undivided interest in Thomas' net probate estate and that Thomas would have the right to an exempt estate, the use of the mansion house for one year, and an undivided interest in Jane's net probate estate.

10. The parties understand that in the event of a divorce or separation of the parties that Jane in the absence of an agreement between the parties would have the right to have a court of competent jurisdiction determine an amount of alimony for her support in accordance with Thomas' financial circumstances, the manner and

style of their mode of living, his assets and such other factors as might then be the statutory or common law of the jurisdiction considering the matter.

11. The parties in light of the matters set out in the first ten paragraphs above agree that neither shall have any interest in the property of the other except as specifically set out hereinafter.

12. Thomas shall have no interest in any real or personal property of Jane during this marriage nor in the estate of Jane upon her death nor shall he have any right to alimony in the event of a divorce or separation between the parties. Thomas will not on the death of Jane assert any claim, interest, estate or title under the laws of any state because of such survivorship in or to the property, real, personal or mixed or to the life insurance of which

such deceased party may die seized or possessed and Thomas agrees on request to make, execute and deliver to any proper party any and all acquittances, assignments, assurances, deeds, instruments and receipts that may be necessary and required to effectuate this agreement. Further Thomas agrees specifically to release his right of dower in the property of Jane.

13. Jane shall after the consummation of the marriage between the parties hereto, in the event of the separation or divorce of the parties be entitled to receive as alimony or separate maintenance the maximum sum of $200.00 per month for a period of 10 years, from the time of such separation (either by legal action or by actually living apart) or from the date of a divorce action being filed, if a court of competent jurisdiction will award Jane any alimony.

This shall be the maximum amount Jane shall be entitled to receive under any and all circumstances and conditions, and Jane shall not be entitled to any division of the property of Thomas nor to any expense money or counsel fees in connection with any separation or divorce, and Jane agrees to waive any and all such rights or claims. Further Jane specifically releases all her rights of dower in the property of Thomas.

14. Jane will not on the death of Thomas assert any claim, interest, estate or title under the laws of any state because of such survivorship in relation to the property, real, personal or mixed or to the life insurance of which such deceased party may die seized or possessed and Jane agrees on request to make, execute and deliver to any proper party any and all acquittances, assignments, assurances,

deeds, instruments and receipts that may be necessary and required to effectuate this agreement. Further Jane agrees specifically to release her right of dower in the property of Thomas.

15. Thomas agrees that he shall by Will or by intervivos trust, create (or make part of an existing trust) a trust with Walter L. Gross as trustee and Jane as beneficiary in a standard form to be approved by the Trustee, which trust shall provide for a principal in said trust of the sum value of $2000,000.00 or 20% of Thomas' net estate after taxes whichever amount is lesser. Further, said trust shall provide for all of the income to be paid to Jane for life and upon her death said income shall be used for the education of her children as the Trustee in his sole and absolute discretion shall determine. Upon

the completion of the education of Jane's children, the principal shall be distributed equally to the children of Thomas' body, share and share alike.

16. In the event of a divorce the personal residence of the parties shall be sold and the equity therein realized, shall be divided equally between the parties.

17. In the event of a divorce the personal property and possessions of the parties located in their residence shall be the property of Jane with the exception of Thomas' clothing, sports equipment and other purely personal items. Jane shall be entitled to the ownership of one automobile out of Thomas' property.

18. Thomas agrees to support Jane as long as they shall live together and this agreement shall not prevent Thomas during marriage from making gifts to Jane nor from

making such provisions for Jane in his Last Will and Testament or otherwise as he may desire.

19. If any portion of this agreement shall ever be set aside or declared invalid, it shall not affect the remaining portion of this agreement.

20. This agreement shall become effective only upon the consummation of the proposed marriage between the parties hereto and if such marriage does not take place this agreement shall be null and void.

21. Each party acknowledges that they are fully acquainted with the property, means and resources of the other, that this agreement has been fully explained to each by their attorneys and that they are entering the same voluntarily.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 4th day of September, 1968.

Signed and acknowledged
in the presence of:

_____ _____
Ida Jane Lambert

_____
As to Ida Jane Lambert

_____ _____
Thomas R. Gross

_____
As to Thomas R. Gross

STATE OF OHIO
FRANKLIN COUNTY, SS:

BEFORE ME, a Notary Public, in and for Franklin County, Ohio, personally appeared the above named Ida Jane Lambert and Thomas R. Gross, who acknowledge that they did sign the foregoing instrument, and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal this 4th day of September, 1968.

_____

Notary Public - State of
Ohio Attorney at Law

Thomas R. Gross

I.

20 shares of Pepsi-Cola Bottling Company of Lexington, Kentucky, with approximate value of $70,144.00.

26 shares of Pepsi-Cola Bottling Company of Portsmouth, Ohio, with approximate value of $183,195.00.

40 shares of Pepsi Cola Bottling Company of Ripley, Ohio, with approximate value of $64,163.00.

15 shares of Post Square with approximate value of $12,122.00.

II.

960 shares of First National Bank of Cincinnati

200 shares of Ford Motor

90 shares of Scovill Manufacturing

2600 shares of Pepsi-Cola Company

30 shares of Proctor and Gamble

180 shares of R. C. A.

200 shares of Southern Pacific Railroad

500 shares of Standard Oil of Ohio

212 shares of Trion, Inc.

100 shares of Crown, Cork and Seal

400 shares of Diamond International Corporation

200 shares of Whittaker

200 shares of Wyle Laboratories

50 shares of Clorox

500 shares of Aeronca, Inc.

200 shares of Hitco

III.

$200,000.00 Life Insurance on Thomas R. Gross

$195,000.00 Insurance owned by Thomas R. Gross on lives of others.

The cash value of these policies at this time is very close to $130,000.00. However, I borrowed $97,000.00 of this cash value several months ago and converted it into marketable securities which are included in the list herewith submitted.

IV.

1/6 interest in Gross and Kaplan Realty. This is a partnership that owns real estate in Pepsi-Ripley, Pepsi-Portsmouth (of which Columbus is a part), and some real estate in Cincinnati. Value of this interest is approximately $95,182.00.

V.

$28,500 is owed to Huntington National Bank.

Ida Jane Lambert

Household goods and effects $1,000.00

Automobile

APPENDIX 17

RULE 12. DETERMINATION AND JUDGMENT ON APPEAL

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral argument of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately agrued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error.

APPENDIX 18

§3105.18 Alimony.

(A) In a divorce, dissolution of marriage, or alimony proceedings, the court of common pleas may allow alimony as it deems reasonable to either party.

The alimony may be allowed in real or personal propety, or both, or by decreeing a sum of money, payable either in gross or by installments, as the court deems equitable.

(B) In determing whether alimony is necessary, and in determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors, including:

(1) The relative earning abilities of the parties;

(2) The ages, and the physical and emotional conditions of the parties;

(3) The retirement benefits of the parties;

(4) The expectancies and inheritances of the parties;

(5) The duration of the marriage;

(6) The extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home;

(7) The standard of living of the parties established during the marriage;

(8) The relative extent of education of the parties;

(9) The relative assets and liabilities of the parties;

(10) The property brought to the marriage by the parties;

(11) The contribution of a spouse as homemaker.

APPENDIX 19

§3103.06 Contracts affecting marriage.

(GC § 8002-6)

A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.

Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 85-1582

In the Supreme Court of the United States

October Term, 1985

IDA JANE GROSS,
Petitioner,

vs.

THOMAS R. GROSS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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10pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. Neither the Constitution nor laws of the United States vests in petitioner any right to have her suit reviewed on Writ of Certiorari 4

I-A. A Federal District Court lacks subject matter jurisdiction to review a decision of the Ohio Supreme Court 5

I-B. This action is barred by the doctrine of res judicata 6

CONCLUSION 7

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U.S. 90, 103-04 (1980) 6
Beck v. Washington, 369 U.S. 541, 554-55 (1962 5
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86 (1983) 5
Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981) 6
Gryger v. Burke, 334 U.S. 729, 731 (1948) 5
Layne & Bowler Corp. v. Western Wells Works, Inc., 261 U.S. 387, 393 (1923) 4
Migra v. Warren City School District Board of Education, ... U.S. ....., 104 S. Ct. 892, 894 (1984) 6
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 3, 4

Other Authorities

Rule 17.1(b), (c), United States Supreme Court Rules 1
Supreme Court Rule 17 4
28 U.S.C. Section 1257 6
28 U.S.C. Section 2101(c) 1
42 U.S.C. Section 1983 6

Constitutional Citations

Fifth Amendment, United States Constitution 1, 3
Fourteenth Amendment, United States Constitution 1, 2, 3

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JURISDICTION

The Ohio Supreme Court's *sua sponte* refusal to grant jurisdiction over Petitioner's appeal was entered herein on December 11, 1985, and this petition for a Writ of Certiorari was filed within ninety (90) days following entry of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101(c) and Rule 17.1(b), (c), United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Fifth Amendment of the United States Constitution: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

B. Fourteenth Amendment to the United States Constitution: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

C. Fourteenth Amendment to the United States Constitution: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The operative facts of this case are not in dispute. Respondent, Thomas R. Gross, and Petitioner, Ida Jane Gross, were married on September 17, 1968. This being the second marriage for both, it was deemed appropriate to execute an antenuptial agreement.

In 1981, the Petitioner-Wife filed for a divorce, and in that year, a divorce was granted to her on the grounds of gross neglect of duty, and inter alia, the Court approved the antenuptial agreement previously entered into by the parties.

From that decision, an appeal was taken to the Court of Appeals, Tenth Judicial District, Franklin County, Ohio, where, in a two-to-one decision, the Court of Appeals reversed the trial court, as it pertained to the validity of the antenuptial agreement. That opinion was rendered in Case No. 82AP-741, on February 10, 1983.

An appeal was then taken to the Supreme Court of Ohio in Case No. 83-564, wherein the Court of Appeals was reversed and the antenuptial agreement was validated, however, the case was remanded to the trial court for a review and modification of the alimony order.

This mandate was carried out by the trial court, and an appeal was once again taken to the Court of Appeals which was denied. An appeal was taken by the Petitioner-Wife to the Supreme Court of Ohio who refused to rehear the matter.

SUMMARY OF ARGUMENT

1. Neither the Constitution nor laws of the United States grants Petitioner a right to review on a Writ of Certiorari. This Court traditionally has demanded a demonstration of the existence of unresolved federal questions of sufficient scope and impact to justify an exercise of its discretionary jurisdiction. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

Petitioner's suit, which seeks nothing more than federal court review of a state court interpretation of state law, is bereft of federal issues. Even if federal issues were present this action is so unusual and episodic in nature that review by this Court would not result in resolution of important questions of federal law.

2. In seeking reversal, Petitioner invites this Court to depart from prior interpretations of the Fifth and Fourteenth Amendments of the United States Constitution.

Petitioner attempts to relitigate issues which she raised or could have raised in the courts below. Therefore, this action is also barred by the doctrine of res judicata.

ARGUMENT

I

Neither the Constitution nor Laws of the United States Vests in Petitioner Any Right to Have Her Suit Reviewed on Writ of Certiorari.

Whether to grant review on a Writ of Certiorari is solely within the discretion of this Court. Sup. Ct. R. 17. Before a Writ of Certiorari will issue, Petitioner must demonstrate to the satisfaction of this Court that her case presents "special and important reasons" deserving attention. Id. These reasons go "beyond the . . . episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). They must involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties," or must arise in the context of a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Wells Works, Inc.*, 261 U.S. 387, 393 (1923) (quoted in *Rice*, 349 U.S. at 79), or between state courts of last resort. Sup. Ct. R. 17.

Viewing this test from the perspective of the instant controversy, Petitioner could not find herself on shakier ground. First, the test for issuance of a Writ of Certiorari presupposes issues of federal concern.

Petitioner alleges no violation of any specific federal constitutional rights other than in the most conclusitory terms, to-wit, her unhappiness with the manner in which the Ohio courts resolved the question of the validity of an antenuptial agreement.

Even assuming, arguendo, that a misapplication of state law occurred during Petitioner's protracted journey

through the Ohio court system, the Equal Protection Clause and the right of non-deprivation of "life, liberty and property" does not guarantee freedom from judicial error. *Beck v. Washington*, 369 U.S. 541, 554-55 (1962). Nor may a federal court substitute its own judgment, on an allegedly erroneous interpretation of state law by a state court, and then treat its determination that error occurred as conclusively demonstrating there was a violation of the Due Process Clause in the state court proceeding. *Gryger v. Burke*, 334 U.S. 729, 731 (1948).

Petitioner cannot identify any benefit which will flow to the public as a result of continued litigation in this matter. The idiosyncratic nature of this case will make any decision on the merits rendered by this Court capable of producing no consequences for future litigants.

Petitioner can hardly argue that any juristic conflict will be resolved should her request for review be granted. In short, Petitioner's case satisfies none of the criteria established for distinguishing meritorious from meritless petitions for Writs of Certiorari.

I

A. A Federal District Court Lacks Subject Matter Jurisdiction to Review a Decision of the Ohio Supreme Court.

From its inception, Petitioner has attempted to attack collaterally finality of a state court proceeding. It is well established that it is without jurisdiction to review, much less reverse or modify, judicial determination of the state's highest court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86 (1983). This applies in spite of allegations that "the state court's action was un-

constitutional." Id. Review see also 28 U.S.C. Section 1257, and Petitioner has already exhausted her opportunity to present her arguments regarding the lower court's handling of the case. Petitioner's invention of specious federal issues cannot resuscitate long-resolved questions of law. She is not entitled to a federal review of state court action because she is disappointed by the Ohio court's response to her plea.

I

B. This Action Is Barred by the Doctrine of Res Judicata.

According to the doctrine of res judicata, a litigant is barred from "relitigating issues that were or could have been raised" in an earlier case. *Federated Department Stores v. Moitie,* 452 U.S. 394, 398 (1981); see also *Migra v. Warren City School District Board of Education,* ..... U.S. ....., 104 S. Ct. 892, 894 (1984). Res judicata applies in federal court to bar relitigation of matters adjudicated in state court, and the doctrine is fully applicable even to actions under 42 U.S.C. Section 1983. *Allen v. McCurry,* 449 U.S. 90, 103-04 (1980).

CONCLUSION

For the above reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Respondent's Answer Brief was served upon C. William Brownfield and William H. Arnold, 140 East Town Street, Columbus, Ohio 43215, counsel for Appellant, by regular United States mail, postage prepaid, this 14th day of April, 1986.

GEORGE W. GROSS
Counsel of Record